

STATE OF ILLINOIS

APPELLATE COURT

21 I.H. 218

AT AN APPELLATE COURT, for the ^{THIRD}~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Judge

HONORABLE WILLIAM M. CARROLL, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 22nd day
of OcTOBER A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

11120

General No. 10376

Agenda No. 2

Ruby E. Ryan, Individually and as)
Administrator of the estate of James)
E. Bailey, deceased,)

Plaintiff-Appellant,)

vs.)

Appeal from the
Circuit Court of
Douglas County

C & D Motor Delivery Co., a corp-)
oration, and Ralph T. McKenzie,)

Defendants-Appellees.)

CARROLL, J.

This action was brought in the Circuit Court of Douglas County to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of the defendants in the operation of a motor vehicle.

The jury returned a verdict in favor of the defendants and the trial court overruled plaintiff's post trial motion and entered judgment on the verdict. The plaintiff appeals from such adverse judgment.

The accident occurred on March 19, 1959, East of Tuscola on Illinois Route 36, a 2 lane, hard surfaced highway. Plaintiff's decedent was driving a 1946 Ford in an easterly direction with a single passenger, one Bailey, who also died in the collision. The defendant,



Ralph T. McKenzie, was driving a tractor-trailer combination for his employer and co-defendant, C & D Motor Co., in a westerly direction. The collision between the 2 vehicles occurred about 11:20 P. M. The weather was clear and dry. Following the collision the tractor was found lying on its right side in a ditch to the south of the pavement and the trailer was found lying on its right side across the pavement. Decedent's automobile was found to be upright facing in a northeasterly direction in a ditch to the north of the pavement. The bodies of decedent and his passenger were found on the highway. An oil slick was found to have spread over the south portion of the pavement to just north of the center line. A gouge mark was found commencing 10 inches north of the center line and running to the southwest, a distance of 52 feet at which point skid marks were found going off the pavement onto the shoulder, which marks led to the tractor.

Pre-occurrence witnesses testified to the manner in which decedent's automobile was being operated from a point about 5 or 6 miles from the scene of the accident to a point approximately a mile away. This testimony indicated a pattern of somewhat erratic driving up to a point a mile or less from the scene of the occurrence. No occurrence witnesses testified. The theories of both plaintiff and defendants are grounded upon inferential evidence. At the time of the occurrence decedent was 19 years of age. His mother and father had been divorced some years earlier. The mother testified that she obtained the divorce for the decedent's father's fault; that the father had not contributed anything towards the support of his family and that she



obtained custody of decedent. At age 16 decedent quit high school and had worked for a filling station and a furniture store. At the time of his death he was working as an attendant at a filling station. He was in good health and turned over his earnings to his mother who used such money for the expenses and maintenance of the household. The decedent's step father testified to his good work record and to his having been helpful around the house. On direct examination of the step father, the following questions and answers appear:

"Q. Without dragging this on, was he a good lad?

"A. I thought so.

"Q. Were you proud of him?

"A. I certainly was. His contributions helped us and we used them."

Then followed the following cross examination:

"Q. Mr. Ryan, I believe you stated that Mr. Bailey was a good lad. Is that right?

"A. I thought he was, yes sir.

"Q. Did he live in your home from July 1, 1954, to November 23, 1955?

"A. No, he did not. He was at a place up near Rockton, Illinois, to school there.

"Q. What place? What kind of place was that?"
(Objection overruled.)

"Q. For what purpose--"
(Objection overruled.)

"Q. I say what type of a place was this?

"A. It was a school for boys, farm school.

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"Q. Did he go there voluntarily?"
(Objection overruled.)

"A. Partially so.

"Q. Actually wasn't he committed to go there by the Court?

"A. I believe he was.

"Q. Do you know whether he was in trouble with the Urbana police during the month of November of 1955?

"Mr. Zimmerly: I am going to object.

"The Court: This witness testified he was a good lad of whom he was proud.

"A. That's right.

"The Court: Objection is overruled.

"Q. Now, Mr. Ryan, do you know whether James Bailey was arrested?" (Objection sustained.)

"Q. You know whether he was in trouble and arrested at any time during the year 1958?" (Objection sustained.)

"Q. Do you know, Mr. Ryan, whether he was arrested at any time during the year 1959?" (Objection sustained.)

Plaintiff's motion to withdraw a juror and have a mistrial declared was overruled. The defendants called 2 witnesses who appeared carrying bound volumes. The first was a Police Magistrate of the City of Urbana. Following objection by plaintiff, an offer of proof was made outside the presence of the jury in which it appeared that the witness was able to prove that certain charges for traffic violations against the decedent had been brought before him. The jury was instructed to disregard the appearance of this witness and the record book he carried. The defendants then called to the stand the County Clerk of Champaign



County who also carried a bound record volume or volumes. The offer of proof made outside the jury's presence discloses that this witness could show that decedent had been adjudicated a delinquent in 1952 and had been committed to the boys farm at Rockton, Illinois, for violation of probation in July of 1954. Again the jury was instructed to disregard the appearance of this witness and the record books he carried. It should be noted that the adjudication occurred when decedent was 12 years old and that the commitment occurred when he was 14 years old.

One of plaintiff's witnesses was a photographer through whom certain photographs were admitted and who testified directly of his own knowledge to gouge marks, debris and the like. Upon direct examination this photographer testified to the accuracy of certain photographs which he prepared. Following the testimony of the witness concerning his own knowledge and observances, and following the admission into evidence of the photographs he had prepared, plaintiff attempted to have the witness illustrate the relationship of various marks and gouges by drawing a diagram on a black board. The Court sustained an objection for the reason that the testimony and photographs adequately covered the subject. The plaintiff complains of the trial court's ruling. We hold that the trial court acted within its sound discretion in limiting further exploitation of the witness. It would appear that the witness was thorough in his relating his own observation and, of course, the photographs were self-explanatory.

Any diagraming and additional explanatory testimony by this witness would seem to be argumentative in character and without any real probative value.

Error is charged in the trial court's refusal of the following tendered instruction (Plaintiff's Instruction 4, tendered and refused):

"A minor is not held to the same standard of conduct as an adult. When I use the words "Ordinary Care" with respect to the decedent, I mean that degree of care which a reasonably careful minor of the age, mental capacity and experience of the decedent would use under circumstances similar to those shown by the evidence. The law does not say how such a minor should act under those circumstances. That is for you to decide. (IPI No. 10.05)"

It is our judgment that the tendered instruction was erroneous and that it was properly refused by the trial court. In our view a minor must be held to the same standard of care as an adult with respect to the operation of a motor vehicle. Betzold, et al. vs. Erickson, et al., 35 Ill. App. 2d, 203. Other errors with respect to instructions are claimed by the plaintiff, but we do not believe that the instructions were applicable under the evidence, and discussion of such errors is not necessary to our disposing of this appeal.

The plaintiff contends that the pre-occurrence testimony of the manner in which decedent's automobile was operated was too remote. The last observation occurred when the automobile was at least 3/4 of a mile or a mile from the scene of the occurrence. The plaintiff relies upon the decision in Hanckv. Ruan Transport Corp. 3 Ill. App. 2d 372. In the Hanck case we held that the trial court properly exercised



its discretion in sustaining an objection to an offer of proof that a motor vehicle involved in that subject collision veered over the center line at a point some 800 feet from the point of collision. Such an offer did not disclose any continued pattern of conduct as is presented in the instant case. Here the testimony of the witnesses taken together indicated that for approximately 5 miles the decedent had been operating his automobile in an erratic fashion. In the absence of occurrence witnesses, we believe that testimony relating to a pattern of conduct does have probative value and that the trial court did not abuse its discretion by permitting such testimony. In the Hanck case we sustained the trial court's ruling as sound, not because it occurred more than 800 feet from the point of collision, but rather because the proof concerned a single isolated incident and raised no inference of continued conduct.

The plaintiff contends reversible error in the court's permitting proof relating to the prior adjudication and other pre-occurrence traffic violations. It is obvious to us that the defense purposefully called the County Clerk and Magistrate to get across to the jury that the decedent had been in some trouble with the police. It appears that plaintiff's attorney did his best to forewarn the court with respect to this objectionable testimony and in our view the court should not have permitted the Magistrate nor the Clerk to take the stand in the presence of the jury. Standing alone, under different circumstances, perhaps this error alone would not be sufficient to



warrant a new trial. When considered, however, together with the objectionable cross-examination relating to the prior delinquency adjudication, it seems clear to us that the defense successfully tried the character of this minor decedent. With respect to the delinquency matter, we believe the question presented to the trial court was whether or not decedent's adjudication at age 12 and his subsequent violation of probation and commitment at age 14 was of sufficient probative value on the question of damages as to overcome the obvious prejudicial nature of such proofs, considering that the accident occurred when decedent was 19 years of age, and in the light of uncontroverted testimony that he was in fact contributing to his next of kin. Consider the following portion of the Family Court Act, Smith Hurd Illinois Annot. Statutes, 23, Section 2001:

"A disposition of any child under this Act or any evidence given in such cause, shall not, in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this Act, and no adjudication under the provisions of this Act shall operate as a disqualification of any child subsequently to hold public office or as a forfeiture of any right or privilege or to receive any license granted by public authority; and no child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction. Neither the fact that a child has been before the children's court for hearing, nor any confession, admission or statement made by him to the court or to any officer thereof while a male or a female under the age of 18, shall ever be admissible as evidence against him of his interests in any other court or proceeding, except in trials of suits for libel or slander, wherein such fact, confession or statement is material and relevant."



A child might be committed to a rehabilitating state institution without any fault of his own and it is obvious that the legislature contemplated such a possibility when adopting the foregoing portion of the Family Court Act. It would seem that the evidence adduced by defendants would not be admissible in an action brought by the minor in his own behalf for personal injuries. While we believe that a defendant ought to have some latitude in taking issue with a minor's earning capacity, habits of thrift and industry and future prospects, we believe that a common sense limitation to such inquiry ought to be applied. The fact that this decedent was adjudicated a delinquent at age 12, violated probation at age 14, and was in fact committed some 4 or 5 years prior to this occurrence has very little probative value. The commitment might very well have been occasioned by the abandonment or neglect by his divorced parents. The fact is, that at and immediately prior to his death he was industrious and in fact contributing to the support of his next of kin. The defense, having been permitted to show the fact of remote prior delinquency, the remote prior commitment, and the suggested additional trouble with the police, injected a foreign and objectionable issue into the case. It should be noted that our holding in this regard is not based upon the above quoted portion of the Family Court Act. We do believe, however, that the language of the statute reflects what we hold to be proper policy with respect to evidence relating to prior conduct or activity of a minor, whether decedent or not, under these circumstances.



It is our opinion, therefore, that plaintiff was deprived of a fair trial because of the injection of harmful prejudicial evidence and the judgment is, therefore, reversed and the cause remanded for a new trial.

Reversed and remanded.

REYNOLDS, P. J. and ROETH, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

38 I.A. 219

AT AN APPELLATE COURT, for the ^{THIRD} ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Judge

HONORABLE WILLIAM M. CARROLL, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 22nd day
of OCTOBER A. D. 1962, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:



STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

L. CONN.

General No. 10402

Agenda 1

People of the State of Illinois,)	
)	
Plaintiff-Defendant in error,)	
)	
vs.	)	Error to the
	)	Circuit Court of
Fred Sehr,	)	Pike County
)	
Defendant-Plaintiff in Error.)	

ROETH, J.

The defendant in this case was charged and convicted by a jury with the crime of assault upon a school teacher under Section 60 (b) Chapter 38 of the Illinois Revised Statutes 1959. The Act provides as follows:

"Whoever, while upon or adjacent to the grounds of any school or any part of a building used for school purposes, whether his entry was lawful or not, commits an assult or an assault and battery upon any teacher or other person employed in such school shall be fined not less than \$100.00 nor more than \$1,000.00 or shall be imprisoned in the County Jail for not less than one month nor more than one year, or both."

He was sentenced to five months in jail and fined \$200.00. In a separate count in the indictment he was charged with assault with intent to murder as well as the charge upon which he was convicted. A verdict of not guilty was returned by the jury as



to the charge of assault with intent to murder.

The alleged assault occurred in the Pleasant Hill school after school. It appears from undisputed testimony that the defendant's son was and for some time prior to the altercation had been taking band instructions from the complaining witness. On the date in question the son returned to his home after school and informed his father that the complaining witness had abused him by compelling him to turn his musical instrument over to another student and use an older instrument. That he had reprimanded him and then later placed his arm around the boy pulling him toward him and stating that he liked the boy very much. According to the testimony, the defendant and the complaining witness had discussed similar alleged conduct of the complaining witness. The defendant then went to the school where he found the complaining witness and the altercation followed.

When the defendant entered the building the complaining witness was in what was known as the music room. In another room on the same floor of the building a 4-H class was being conducted and attended by some 13 school girls and their counselor. These 13 girls and their counselor were called as witnesses for the people. While there is some dispute over the ability of these witnesses to have seen and heard what transpired in the music room when the defendant first made his appearance, at least three



of these witnesses testified they were able to observe the defendant as he entered the music room and what transpired. The 14 witnesses testified without exception to noting the defendant's truck pull into the school grounds and described the action of the vehicle as it entered the grounds as reckless and indicated that defendant was speeding. One of the girls shouted a warning to the complaining witness that the defendant was coming. All of these witnesses further testified that the complaining witness then proceeded to run down the hallway, chased by the defendant, and that ultimately the complaining witness dropped to the floor and the defendant commenced to beat him. One witness testified that she was able to observe the defendant enter the music room and "he yanked the door open and said 'you better be ready'". About that time the complaining witness saw him and started running. The complaining witness had been working on a clarinet, according to the witnesses who could observe him in the room, and according to his own testimony, when the defendant entered the building. The witnesses who could observe that which took place when the defendant entered the music room testified that the complaining witness did not strike nor make any threatening gestures toward the defendant but immediately began running. The defendant testified that he approached the complaining witness meaning only to bring the matter of his alleged misbehavior to a head. He



stated that he walked briskly toward the complaining witness and said, "how many times do I have to tell you to keep your hands off Freddy and quit mistreating him". That when he was approximately one step from him, the complaining witness backhanded him with the clarinet. He testified it was a glancing blow and the skin was not broken. It was then that he said, "you better be ready". He stated that the complaining witness raised the clarinet again as if to strike him, at which time the defendant lunged for the complaining witness, who in turn, turned and ran. He testified that the complaining witness fell flat for no reason accountable to defendant, his body, arms and legs seeming to hit the floor at the same time. He then testified that he caught up with him and about that time the complaining witness was on his knees with the clarinet in his hand and raised back in a striking position. The defendant then testified that he put his arm over the right arm of the complaining witness to keep him from striking him and pummeled him a few times. He stated he then heard the 4-H counselor call his name, he turned and saw her and walked off. The testimony of the counselor contradicts the defendant. She testified that after the defendant had chased the complaining witness through the cafeteria where the 4-H meeting was being conducted and into the hallway she followed them out and when she arrived she saw the defendant beating the complaining witness,



who was on the floor on his hands and knees and described it by saying that "he was beating him brutally and forcibly"; that the complaining witness had his hands behind his head trying to protect his head; that she picked up a chair in an effort to push the defendant off the complaining witness and the defendant threatened her with like treatment if she did not leave; that the complaining witness was merely protecting himself and saying, "please don't hit me any more". The complaining witness's testimony is substantially the same as that of the counselor. He testified that when he saw the defendant enter the classroom and heard him say, "you had better be ready" he turned and ran, the clarinet still in his hand. The defendant tripped him and then jumped upon him after he fell, striking him on the head and body with his fists and kicking him in the ribs several times. Medical testimony was introduced in the record showing the extent of injuries sustained by the complaining witness.

The defendant contends that the court erred, first, in admitting incompetent, immaterial and prejudicial evidence relating to the reputation of the defendant in the community. He makes reference to the testimony of the complaining witness elicited on cross examination by defendant's counsel. That testimony is repeated here verbatim:

"Q. Now, when Mr. Sehr came into that band room on May 2, why did you run, if you did?



A. May I make this in two or three answers in one? Number one-- I have a congenital heart condition which forbids me from fighting; number two is the reputation of Mr. Behr around the community--

(Objection by counsel)

A. The reputation of this man was so terrific in the community and he had been warned about firearms, about blackjacks, and--

(Objection. Request that the answer be stricken as not being responsive to the question.)

The Court: The motion to strike the testimony is denied. He can state his reasons. He was asked why he ran.

A. And the third reason-- I do not think it is proper for a schoolteacher to engage in a brawl with a parent."

This is the only evidence of defendant's reputation placed in evidence. In People v. Page, 365 Ill. 524, 6 N.E. 2d 845, the court said:

"... the question is not what a court of review may think of the defendant's guilt or innocence, but what the jury would have done if the case had been submitted to them without those aspersions."

Regarding this testimony in that light we fail to see that it was of any influence nor do we feel it was prejudicial. Moreover, counsel for defendant elicited the answer on cross examination and the answer given can hardly be said to be unresponsive.

Defendant's second assignment of error is the court's refusal to permit evidence on the part of the defendant going to the former relations of the complaining witness with various former schools, school boards and pupils. Defendant



contends that where it appears the person assaulted, attacked the accused, the character of the person assaulted may be shown.

Ordinarily the good or bad character of the victim of an assault is irrelevant to the question whether defendant has committed a crime with which he is charged. To this general rule of exclusions there are two main exceptions usually arising in homicide cases. "(1) When the issue of self defense is raised and the character of the slaying is doubtful, evidence of violent and dangerous character of the deceased is relevant in determining whether deceased or accused was the aggressor, and; (2) When the evidence tends to prove that the accused acted in self defense evidence of the violent and dangerous character of the deceased, known to the defendant, is admissible as tending to characterize the acts of the deceased as bearing on the reasonableness of the defendant's apprehension of danger at the time of the homicide." Wharton Criminal Evidence, Section 228.

At the time the attempt was made by the defendant to introduce this testimony there was nothing before the court showing the complainant the aggressor, nor was there any evidence tending to prove the accused was acting in self defense. The defendant at no time made effort to re-introduce this evidence after his testimony, which tended to show self defense. This testimony was not admissible at the point in the proceedings



and the court's ruling was proper. People v. Terrell, 262 Ill. 138, 104 N.E. 264.

From the record it is not clear whether this testimony was designed to establish that the complaining witness was a sex deviate or to prove that the complaining witness started the altercation by swinging first. If it was for the first reason, it was clearly irrelevant for by defendant's own admission the complaining witness had not committed an illicit act on defendant's son and was not attempting to do so when the fight started. The assault could hardly be termed self defense for this reason alone. No such illicit attempt was being made nor had it actually been made at the time of the altercation, nor had it actually been made earlier. If the offer was made for the second reason, namely to show complaining witness the aggressor, it was premature. People v. Terrell, supra.

The defendant next contends that the court erred in giving People's Instructions No. 5 and 7 and in refusing Defendant's tendered Instructions 20 and 21. People's Instruction No. 5 dealt with the crime of assault with intent to murder and defendant was acquitted of that charge. Other instructions given sufficiently covered the charge under which defendant was convicted and there is nothing in the 5th instruction that would in any^{way} prejudice the defendant. People's Instruction No. 7 read as follows:



"The court instructs the jury that the prosecution is not required to establish the guilt of defendant beyond any possibility of a doubt."

In a negative way the instruction is an effort to define reasonable doubt and the courts have generally discouraged the use of such an instruction. We fail to see, however, that defendant could have been prejudiced by it. Other instructions tendered by both the State and the defendant properly defined the burden of the State to prove its case beyond a reasonable doubt.

Defendant's instructions number 20 and 21, refused by the court, read as follows:

"20. The Court instructs the jury that if you believe from all the evidence that defendant, Fred Sehr, had reasonable grounds to believe that Gustav J. Rieckhoff, Jr., had either taken indecent liberties with Fred Sehr, Jr., or that Gustav J. Rieckhoff, Jr., was about to take indecent liberties with Fred Sehr, Jr., you may take that fact into consideration in arriving at your verdict.

"21. The Court instructs the jury that if you believe that the defendant, Fred Sehr, had a reasonable apprehension that his son, Fred Sehr, Jr., had had indecent liberties taken with him, you may take such fact into consideration in arriving at your verdict."

It should be first noted that each instruction contains the words "that the defendant had reasonable apprehension that the complaining witness had either taken indecent liberties with his son or was about to do so". By the defendant's own admission



the witness had not taken such liberties with the boy and the instruction concerns something that is not in the evidence. Certainly if the defendant's own testimony negates his apprehension of illicit relations, what better proof could there be that he had no such fears. He testified as follows:

"Q. Mr. Sehr, you were asked if you had any complaint on homosexual activities. By referring to homosexual activities do you mean the actual act of homosexuality?

A. Yes-- that's what I mean.

Q. As far as homosexual activities are concerned, as to preliminary activities, did you have any complaint as to that?

A. That I did. I could see the buildup."

He denies throughout that he had any knowledge that the complaining witness was homosexual or that he had any facts of such conduct. The record also discloses that more than one hour elapsed from the time of the incident reported by the boy, to the time of the altercation and further that the boy was at home a good distance from the school when the altercation took place. Defendant misconstrues the law. He states that the jury may be instructed as to any matters which lead to the provocation of the crime for the purpose of determining the punishment. Ruble v. The People, 67 Ill. App. 438. While no argument is made with the rule of law it has no application to the instructions tendered here. The jury under the facts in this case would not



be warranted in believing that defendant believed or had apprehensions that the complaining witness had taken indecent liberties with defendant's son and it would not be warranted in finding that the threat of the illicit act itself would warrant the defendant taking the law into his own hands. The defendant's apprehension was not a present concern for his son but a future concern. According to his testimony he felt the complaining witness was building up to the performance of the illicit act. It is therefore clear that both instructions might tend to mislead a jury into believing such apprehension a defense to the charge made herein.

Finally, the defendant contends that the court erred in not directing a verdict for defendant at the close of the evidence and that the verdict is not sustained by the evidence. A reading of the record discloses that both contentions are without merit. There was ample evidence presented to sustain the conviction herein. Ordinarily it is the peculiar province of the jury to weigh the evidence. People v. Arnett, 408 Ill. 164, 96 N.E. 2d 535; and to determine the credibility of the witnesses and guilt or innocence of the accused, Smith v. People, 103 Ill. 82; and even though evidence regarding material facts is conflicting and irreconcilable the reviewing court will not substitute its judgment for that of the jury on such matters, despite the fact that it may have a different opinion as to the preponderance.



People v. Moretti, 330 Ill. 422, 161 N.E. 766; 15 I.L.P.,
Criminal Law, Section 911, page 374. In the case at bar the
court does not have a different opinion than the jury as to
where the preponderance of the evidence lay.

For the reasons stated herein the judgment of the lower
court is affirmed.

Affirmed.

Reynolds, ^{P.} Justice, and Carroll, Justice, concur.



STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

38 I.A. 219

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at
Springfield, on the FIRST TUESDAY in _____ OCTOBER _____ A. D. 19 62

PRESENT

_____ HONORABLE C. ROSS REYNOLDS, _____ Presiding Justice

_____ HONORABLE WILLIAM M. CARROLL, _____ Justice

_____ HONORABLE BURTON A. ROETH, _____ Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the _____ 22nd _____ day of

_____ OCTOBER _____, A. D. 19 62, there was filed in the office of the said Clerk of said Court,

which opinion, as modified, December 11, 1962, is
an opinion of said Court/in words and figures following:



FILED

OCT 2 1962

Robert L. Conn, CLERK
APPELLATE COURT 3RD DIST.
Modified December 11, 1962
on denial of rehearing

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10409

Agenda No. 9.

Paul J. Rothacher,

Plaintiff-Counter Defendant-
Appellee,

-vs-

Thurman Jones, Conservator of Allen
E. Jones, Incompetent,

Defendant-Counter Plaintiff-
Appellant.

)
)
)
) Appeal from the
) Circuit Court of
) McLean County.

Opinion as modified upon denial of petition for re-hearing.

REYNOLDS, J.

An automobile driven by Allen Eugene Jones and one driven by Paul J. Rothacher, collided on U.S. 51, about 12 miles north of Normal, Illinois, at approximately 6:40 P.M. August 3, 1959. Jones was proceeding north and Rothacher was proceeding south. Jones was following a northbound



automobile driven by James Wise. The highway was straight, the point of the collision being in a slight depression or valley, the road sloping down from about one-quarter of a mile south to the point of collision and from about one-quarter of a mile north to the point of collision. The highway north of the point of the collision was rough and Wise had slowed from 65 miles per hour to about 60. The Rothacher car passed one Louis Lovins north of the point of collision when Lovins was preparing to enter the highway. Rothacher was then traveling about 65 to 70 miles per hour. Lovins entered the highway and was following the Rothacher car and was at the top of the incline to the north when the collision occurred. He saw the Jones car pull out about half-way into the southbound lane, and then attempt to cut back. The front portion of the Jones automobile was back into the northbound lane when the collision occurred. Lovins testified that Rothacher at no time changed his speed, his brake lights did not go on, and he did not swerve his car. There was a shoulder of 8 to 10 feet on the right, looking south, but according to Lovins' testimony Rothacher made no attempt to pull on the



shoulder. The impact between the two automobiles was about two feet west of the center line, in the southbound lane. The Rothacher car stopped on the shoulder on the west side of the road and the Jones car ended up on the east shoulder of the road, across a ditch.

James Wise and his wife testified that Jones had followed their car closely for several miles. He had observed the Jones car in his rear mirror for several miles and that it was close, a car length or less. Wise had been driving at a speed of 60 to 65 miles per hour. The first thing he knew of the collision was a sound like an explosion and he looked in his rear view mirror and saw debris in the air, about 10 to 15 feet to the rear of his car. He was familiar with the stretch of road where the collision occurred and had slowed for the rough pavement. Wise heard no brakes prior to the collision. Neither Wise or his wife saw the Jones car pull out to pass.

Rothacher was injured in the collision and brought suit.



against Jones for his injuries in the amount of \$65,000.00 and for damage to his car. Jones was so severely injured that his brain was damaged and his mentality reduced to that of a child, and his conservator, Thurman Jones, filed an answer to the complaint, and counterclaimed in two counts, one charging Rothacher with negligence, and the second charging wilful and wanton misconduct, asking \$175,000.00 damages in each count.

At the close of all the evidence, the counter-defendant Rothacher moved for directed verdicts in his favor as to Counts I and II of the counter-complaint, and these motions were allowed by the court and judgment entered against the counter-claimant Jones, and in favor of the counter-defendant Rothacher as to both Counts I and II of the counterclaim. The claim of Rothacher against the defendant Allen E. Jones, having been dismissed, the defendant-counter-claimant appeals to this court.

The only matter before this court is the correctness of the trial court's order directing a verdict in favor of Rothacher, as to Counts I and II of the counterclaim. The



rule in Illinois on this point has been strongly established for many years. If there is any competent evidence, together with all reasonable inferences to be drawn therefrom, standing alone, taken with all its intendment in an aspect most favorable to the plaintiff, tending to prove and from which the jury might reasonably find negligence of the defendant, the court has no right to direct a verdict for the defendant. Stowers v. Carp, 29 Ill. App. 2d 52, 63. The ruling on a motion for a directed verdict is tested by taking only the evidence favorable to the plaintiff and drawing legal inferences most favorable to him to prove the elements of his case. March v. Hirshman, 11 Ill. App. 2d 245; Wilinski v. Belmont Builders, Inc., 14 Ill. App. 2d 100, 103. As to each count, the court will look only to the proof and inferences therefrom favorable to the plaintiff: the court cannot weigh conflicting evidence. Proof unfavorable to the plaintiff, even though introduced by the plaintiff, cannot be considered. The determination to be made is whether there is any evidence (all unfavorable evidence excluded) upon which the jury could base a verdict for the plaintiff under the count in question, and if there is, the



motion as to that count must be denied and the issues submitted to the jury. Kiriluk v. Cohn, 16 Ill. App. 2d 385, 388, 389; McCormick v. Kopmann, 23 Ill. App. 2d 139, 206; Johnson v. Livesay, 20 Ill. App. 2d 428. Even where the facts are undisputed or admitted but where a difference of opinion as to the inference that may be legitimately drawn from them exists, it is primarily for the jury to draw the inference. Denny v. Goldblatt Bros. Inc., 298 Ill. App. 325; Pantlen v. Gottschalk, 21 Ill. App. 2d 163; Johnson v. Livesay, 29 Ill. App. 2d 428; Cloudman v. Beffa, 7 Ill. App. 2d 276, 284.

Rothacher contends that the court properly directed the verdicts for Rothacher because the question of Rothacher's liability could not be based on imagination, speculation, or mere conjecture, but could only be submitted to the jury if there had been some evidence from which reasonable inferences of the lack of Jones' negligence and that of Rothacher's negligence had clearly preponderated. The cases of Tiffin v. The Great A. & P. Tea Co., 18 Ill. 2d 48; Shaw v. Swift & Co., 351 Ill. App. 135, and Henert v. Chicago & N.W. Ry. Co., 332 Ill. App. 194, are cited by the counter-defendant. The first



two of the cases involved impure food. In the Tiffin case, it was alleged that impure ham was sold by the defendant and the court held that liability may not be based on imagination, speculation or mere conjecture, and the question of its existence should be submitted for jury determination only where there is some direct evidence supporting each material allegation of the complaint or some circumstantial evidence from which inferences of such facts clearly preponderate. The Shaw v. Swift & Co. case involved impure pork products, and the court there held that a jury cannot properly be allowed to determine disputed questions of fact from mere conjecture. That there must be some direct evidence of the fact, or evidence tending to establish circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, else the question should not go to the jury for determination at all. The Henert v. Chicago & N.W. Ry. Co., case was a death case growing out of a collision between defendant's train and an automobile in which the plaintiff's intestate was riding. In that case the court held that there



was no evidence in the record to sustain the essential element that the decedent was in the exercise of due care and caution for his own safety. The case of Overman v. Illinois Cent. R. Co. 34 Ill. App. 2d 30, cited by counter-defendant is another case where the court held that there was no evidence of due care on the part of the decedent. Likewise, the case of Tucker v. N.Y. C. & St. L. R.R. Co., 12 Ill. 2d 532, held that where there is a total failure to prove one or more of the essential elements of the case, in that case due care, the trial court should direct a verdict. This rule has been upheld in other cases, Carrell v. New York Central Railroad Co. 384 Ill. 599; Greenwald v. Baltimore and Ohio Railroad Co., 332 Ill. 627; Illinois Central Railroad Co. v. Oswald, 338 Ill. 270. And the court in the Tucker case concludes with the statement that the record being without evidence of due care on the part of the plaintiff, consequently the plaintiff was guilty of contributory negligence as a matter of law; that contributory negligence becomes a question of law when it can be said that all reasonable minds would reach the conclusion, under a particular factual situation, that the facts



did not establish due care and caution on the part of the person charged therewith. That in such cases, the court should instruct the jury to render a verdict for the defendant. Citing Briske v. Village of Burnham, 379 Ill. 193.

Counter-defendant Rothacher further contends that Jones' car was in a sideways skid and in the wrong lane and that it was his burden to prove excuse or justification for being on the left side of the highway at the time of the collision. Tomlinson v. Chapman, 24 Ill. App. 2d 192; Murphy v. Kumler, 344 Ill. App. 287. In both those cases the automobile of the defendant was in the wrong lane, or on the wrong side of the road, and in each case the defendant's car was in a skid. In neither case was there any explanation or evidence to explain or tend to explain why the defendant's car was on the wrong side of the road.

Driving a motor vehicle on the left side of the highway is not negligence as a matter of law. Andres v. Green, 7 Ill. App. 2d 375. Illinois Transit Lines v. Packer City etc. 9 Ill. App. 2d 161; Chandler v. Gifford, 223 Ill. App. 186. It might

be a question of fact. Whether it is negligence as a matter of fact is a question for the jury. Being in the proper lane does not of itself render Rothacher free from negligence as a matter of law. Cascio v. Bishop Sewer & Water Co., 2 Ill. App. 2d 378. Negligence does not become a question of law unless the evidence, which may be properly weighed upon the motion to direct a verdict, is such that all reasonable men would agree in their deductions from it; and if, from the facts bearing upon the question of negligence, reasonable men of fair understanding might draw different conclusions, the question is one of fact, not of law, and must be submitted to the jury. Cascio v. Bishop Sewer & Water Co., 2 Ill. App. 2d 378; Chicago & N.W. Ry. Co. v. Hansen, 166 Ill. 623; Hoehn v. Chicago, P & St. L. Ry. Co., 152 Ill. 223. This is true as to contributory negligence on the part of the plaintiff. Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d 153; Pennington v. McLean, 16 Ill. 2d 577; Ney v. Yellow Cab Co. 2 Ill. 2d 74. As said in the Ney case: "Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide."

Many cases are cited by the parties herein. To attempt to analyze them would be burdensome and is not necessary. It



will suffice for this opinion to deal with the key points raised by the appeal, namely:- (1) Is there any competent evidence, together with all reasonable inferences to be drawn therefrom, standing alone, taken with all its intendments in an aspect most favorable to the counter-plaintiff, tending to prove and from which the jury might find that the counter-plaintiff was acting with due care and caution for his own safety? (2) Is there any competent evidence, together with all reasonable inferences to be drawn therefrom, standing alone, taken with all its intendments in an aspect most favorable to the counter-plaintiff, tending to prove and from which the jury might reasonably find negligence of the ^{counter} defendant?

As has been stated many times by this court and other courts in Illinois, each case must rest upon its own set of facts. There is no rigid or hard and fast rule that will determine all cases. In ruling on this appeal, this court has examined the evidence and subjecting that evidence to the law as stated in the cases cited, has reached the conclusion that the trial court erred in directing a verdict for the counter-defendant.



The evidence showed the counter-defendant Rothacher to be traveling in his own lane at a speed of about 65 to 70 miles per hour. The evidence of the witness Lovins is to the effect that he saw no evidence of any swerve on the part of the Rothacher automobile, no slackening of speed or application of the brakes. There was sufficient shoulder on the right of the right lane for the Rothacher car to have attempted to avoid the collision. There was room for the Rothacher car to have traveled on part of the shoulder and avoided the collision, if there was time to swerve over. The testimony of James Wise was to the effect that he heard no brakes applied on the Rothacher car or observed anything unusual about the Rothacher car. Lovins stated that he saw Jones pull out, and start to pull back. That Jones got the front of his automobile back into his proper lane, but about 18 inches of the rear of his car was in the Rothacher lane, when the collision occurred. Wise had slowed down to about 60 miles per hour and Jones attempted to pass. He saw he could not and tried to get back in his lane. All these matters pose questions of fact for a jury to consider, questions of the



exercise of care and caution for his own safety on the part of Jones, questions as to the failure or reason for failure on the part of the Rothacher automobile to slow or pull to the right to avoid the collision, questions of negligence on the part of Rothacher, questions as to the proximate cause of the collision. The vital issues here are, was there any evidence in the record which would tend to prove that Jones was exercising due care and caution for his own safety? Was there any evidence in the record that Rothacher was negligent? Was there any evidence that the driving of Rothacher was or might have been the proximate cause of the collision? After carefully considering the evidence, we believe these questions must be answered in the affirmative.

In reaching this conclusion we have been guided by the oft-repeated decisions of our courts, that a motion for a directed verdict is tested by taking only the evidence favorable to the plaintiff and drawing legal inferences most favorable to him to prove the elements of his case. We did not weigh the evidence and did not consider that testimony



which might be considered unfavorable. Using those decisions as a yardstick for the evidence in this case, we believe the motions for directed verdicts should have been denied and the issues submitted to a jury.

In our discussion of this case, we have not endeavored to discuss the issues under Count II of the counter-complaint, namely, wilful and wanton misconduct on the part of Rothacker and the freedom from wilful and wanton misconduct on the part of Jones, but it is believed that the principles of law stated and discussed as to Count I would apply to Count II, insofar as to evidence which would require submission of the issue to a jury.

In conclusion, this court adopts the language of Ney v. Yellow Cab Co., 2 Ill. 2d 74, at page 84, where it was said: "Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair-minded men might reach different conclusions, emphasize



the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of issue. To withdraw such questions from the jury is to usurp its function."

For the reasons stated, the trial court is instructed to overrule the motions for directed verdict both as to counts one and two in the counterclaim and the cause reversed and remanded for a new trial on the counterclaim.

Reversed and remanded with
directions.

CARROLL and ROETH, JJ., concur.



APPEAL FROM

CIRCUIT COURT

COOK COUNTY

Defendant-Appellee.

The evidence favorable to the plaintiff would warrant a finding that the front part of defendant's car struck plaintiff. The evidence for the defendant would warrant a finding that defendant

heard a thud, brought his car to a stop in approximately one and one half car lengths, walked around to the right side of his car, where he first saw Michael. Defendant denied that his right head light was broken, denied that there was blood on his car and denied that his car left any skid marks. His position is that he was driving with due care at reasonable speed and that Michael ran into the side of the car. It is evident that the jury accepted defendant's version of the mishap.

The record supports plaintiff's contention that defendant's use of the police accident report in the presence of the jury might have given the jurors an erroneous impression that the report corroborated the testimony of a witness for the defendant. *Paliokaitis v. Checker Taxi Co.*, 324 Ill. App. 21, 26.

The second point urged by plaintiff is that the attorney for the defendant argued to the jury in effect that Michael should not recover because of the negligence of his parents. Where recovery is sought for the benefit of the child only, it is generally held that the negligence of a parent which concurs with that of a third person in causing injury to a child is not imputed to the child. 65 C.J.S. § 160, p. 801; *Chicago City Railway Co. v. Wilcox*, 138 Ill. 370; *Chicago City Railway Co. v. Tuohy*, 196 id. 410; *Richardson v. Nelson* 221 id. 254; *Perryman v. Chicago City Railway Co.*, 242 id. 269; *Hallis v. Stover Co.*, 275 Ill. App. 44.

Plaintiff maintains that the court erred in giving an instruction on an "accident without fault of the defendant." On



a retrial an "unavoidable accident" instruction should not be given. See IPI 12.03, pp.81-82..

The judgment is reversed and the cause remanded with directions for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P.J., and FRIEND, J., concur.



ARST.

THE PEOPLE OF THE STATE OF ILLINOIS,)

Appellee,)

v.)

WARREN ODOM,)

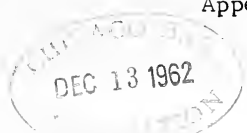
Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

(38 I.A. 291)



MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a Paternity Act proceeding. After a non-jury trial, the court found and entered judgment that defendant, Warren Odom, is the father of a child born out of wedlock to Ernestine Neal, the relatrix, and ordered him to pay \$10 a week for the support of the child. Defendant appeals primarily on the theory that the prosecution failed to prove the charge by a preponderance of the evidence.

In the trial of the issue as to whether defendant is the father of the child, there was a direct conflict in the testimony of the mother and of the defendant. She testified as to a sexual relationship which continued for a period of time, and he positively denied that he had sexual intercourse with her at any time. Although defendant asserts there is evidence in the record tending to show that the mother had intercourse with men other than defendant at or about the time the child was conceived, we fail to find it.

As contended by the defendant, it was incumbent on the People in this case to make out its case by a preponderance of the evidence, and this is not done where the evidence of the prosecution is counterbalanced by equally credible evidence of



the defendant. (McFarland v. People, 72 Ill. 368 (1874); People ex rel. Miceli v. Rembos, 26 Ill. App.2d 429 (1960).) Therefore, the principal question for the determination of the trial court was the credibility of the mother and the defendant.

We do not agree with defendant that the testimony of the mother, Ernestine Neal, the sole witness offered by the prosecution, is uncertain, indefinite and contradictory. On the contrary, her complete testimony carries conviction, even though there may be some inconsequential inconsistencies. There is no denial as to the pregnancy or the date of the birth of the child.

Ernestine Neal testified that: she commenced dating the defendant in September, 1957, when she was 21 years old and he was 35; she had sexual relations with defendant from May or June, 1958, until August, 1959; during this period she had sexual relations with him once a week, generally on Sunday, and specifically on his birthday, July 7, 1959; she found she was pregnant on the 30th or 31st of July, 1959, and this was confirmed by a doctor; she told defendant of her pregnancy at once, and they had some discussion about an abortion; the baby girl was born on March 17, 1960; the acts of sexual relationship totaled between 20 and 25, the majority of which took place at the Hotel Hudson; and that when they went to the hotel she never went to the hotel registration desk, and did not know what name defendant used for their registration.

On cross-examination, she admitted a sexual relationship with someone a year before she met defendant, but denied having sexual relations with anyone other than defendant during the 2-year period subsequent to September, 1957.



She further testified that defendant had given her the phone number of a Bertha Nixon, previously unknown to her, and that she had, at the request of Mrs. Nixon, gone to Mrs. Nixon's home and discussed the pregnancy with her. She stated she told Mrs. Nixon she didn't want an abortion, "It would be murder."

To contradict the testimony of Ernestine Neal, defendant offered his testimony and that of four witnesses. An examination of the testimony of each indicates, despite partial denials, that, collectively, they corroborate the testimony of Ernestine Neal.

Defendant testified that: he met Ernestine Neal in the latter part of September, 1957; they started to go out in January, 1958, and their personal relationship lasted about three or four months; "We broke up because we had had several arguments about her going around with her former boyfriend. I resumed my friendship with her in June of 1959. I never had any sexual relations with Ernestine Neal, period. * * * After I met her in June, I didn't see her any more. She called me in August and told me she was three months pregnant, it was on the first of August. I am denying that I am the father of the child. I have never been to the Hudson Hotel with her a period of 25 times or more or for any period of time. * * * We broke up because she was keeping company with this ex-boyfriend, this minister. When we broke up, I did not go back to her until July, 1959. We went out one time in June and I didn't see her any more."



The manager of the Hudson Hotel testified that: she didn't know anybody by the name of Ernestine Neal or anybody by the name of Odom; she examined the records of the hotel, and there was no registration in the name of Ernestine Neal or of Mr. and Mrs. Neal; she had never seen Ernestine Neal or the defendant until she saw them in court; "transient rooms" are rented twice in the same day; and that she would remember anybody who came to the hotel 20 times or more.

Bertha Mixon testified that Ernestine Neal came to her home about August 25, 1959, at which time they discussed the pregnancy and an abortion; that "she didn't tell me who the father of the child was. * * * She didn't tell me because she had mentioned more than one person to me about who she was going out with. I don't know the names but she mentioned more than one and she had mentioned Mr. Odom's name. * * * She mentioned some person by the name of Lee."

A lifetime friend of defendant, a bartender, testified that he saw Ernestine Neal at the bar where he worked in November, 1959, and she told him she was pregnant, and "I asked her who the lucky man was and she said she didn't know who it was." On cross-examination he stated he had never gone out with Ernestine Neal, and that he never had sexual relations with her, nor had he heard of anybody with whom she had had sexual relations.

A brother of the defendant, the Reverend William Odom, testified that the first time he met Ernestine Neal was in January, 1959, at a birthday celebration for his mother. She had been brought there by the defendant. He talked with her on



July 2, 1960, about her accusation that Warren, his brother, was the father of the baby. He suggested that she take a blood test, and she refused, because she had been advised that blood tests are not conclusive. He testified that his brother flatly denied that he was the father of the child. "He said he had had sexual relations some time back with the girl, but they had broken up. * * * He told me they had broken off around June of 1958. He said they had broken off because an argument resulted over another fellow, an ex-minister student." He admitted surprise when the court informed him that the defendant had denied, under oath, that he had had sexual relations with Ernestine Neal.

It is obvious that the determination of this case depends largely upon the credibility of the mother and the defendant, the putative father. The record indicates the trial judge supplemented the examination by counsel by a careful interrogation of each witness. As the statute specifically directs that "the mother and the defendant shall be competent witnesses and their credibility shall be left to the court or jury as the case may be" (Ill. Rev. Stat. 1958, Ch. 106-3/4, par. 56), we think the record sustains the trial judge in his obvious conclusion that the testimony of Ernestine Neal was entitled to greater weight than the testimony of the defendant.

Where the trial court has seen and heard the witnesses and the testimony is contradictory, this court will not substitute its judgment as to the credibility of witnesses for that of the trial court and will not disturb the findings unless they are manifestly against the weight of the evidence. Ezydorski v. Krozka, 31 Ill. App.2d 79, 85 (1961).



We are satisfied, from an examination of the evidence, that the judgment of the trial court was arrived at after a careful evaluation of all of the testimony, and that the finding and judgment are not against the manifest weight of the evidence.

The judgment is accordingly affirmed.

AFFIRMED.

BURMAN, P.J., and ENGLISH, J., concur.

Abstract only.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
MAY TERM, A.D. 1962

38 I.A.² 112

SAMUEL KELLEY,

Plaintiff-Appellant,

vs.

VILLAGE OF WILLOWBROOK,

Defendant-Appellee.

Appeal from the

County Court,

DuPage County.

MC NEAL, J. -

Plaintiff Samuel Kelley filed a complaint in the County Court of DuPage County for a declaratory judgment that the residents of an unincorporated area within one mile of the boundary line of the defendant Village of Willowbrook were entitled to incorporate the area as a village under section 2-3-5 of the Illinois Municipal Code, without the consent of the corporate authorities of the defendant village. Defendant filed a verified answer denying the material allegations of the complaint and stating as a further defense that the complaint was substantially insufficient in law. After hearing testimony of two witnesses for plaintiff, the court on its own motion ordered and decreed that the cause be dismissed without prejudice. Plaintiff appealed.

According to the report of proceedings plaintiff testified that he resides and owns property in an unincorporated area known as Marion Hills. The area is immediately contiguous to Willowbrook, and includes territory in DuPage County, bounded on the north by 67th Street, on the south by 75th Street, on the west by Clarendon Hills Road, and on the east by Highway 83. About 1400 people live in the area. Plaintiff is a member of the Marion Hills Civic Association. He canvassed the territory to ascertain the will of the residents with respect to



incorporation. The president of the Marion Hills Association testified that he and his committee appeared at meetings of the village trustees of Willowbrook held at the home of Anton Borse, president of the village board, in November, 1960, and again in February and March, 1961. An objection was sustained to a question whether consent for incorporation was requested at the March meeting, and counsel then referred to the provisions of the statute.

The statute (Illinois Municipal Code section 2-3-5, S.H.A. Ch. 24, Par. 2-3-5) reads in part, as follows:

"Whenever any area of contiguous territory, not exceeding 2 square miles, and not already included within the corporate limits of any municipality, and no part of which territory lies within one mile of the boundary line of any existing municipality unless the corporate authorities of such existing municipality consent to such incorporation, and has residing thereon at least 400 inhabitants living in dwellings other than those designed to be mobile, it may be incorporated as a village as follows: * * *."

After examining the statute the trial court expressed the opinion that the residents of the area should first petition or seek annexation to the corporate entity before seeking to incorporate as a separate entity, and that testimony relative to a verbal request for such consent would not fulfill the requirements of the statute. Appellant's counsel announced that the Court's interpretation of the statute was different from his, and that he "would like to stop this thing now." His opponent promptly moved that it be dismissed.

Appellant's counsel questioned the finality of the order, and indicated the desirability of "a ruling of the Supreme or Appellate Court on the specific point, because there is no law on the subject." After a short recess for consultation with his clients, the hearing was resumed, and counsel then said: "Let the record show that the plaintiff in this case is voluntarily dismissing said action and asks

that the court indicate that said dismissal be without prejudice and that no costs be allowed to the defendant or attorney fees." Defendant's counsel suggested that plaintiff should pay defendant's \$5 appearance fee, and the court indicated that he would not allow attorney fees. Plaintiff's counsel reiterated his request that the case be dismissed without prejudice, stated that he was seriously considering looking up the law on the matter of appeal, and therefore requested the court to indicate a final order in the record.

The record shows the following colloquy between the court, Mr. Borkenhagen, plaintiff's counsel, and his opponent, Mr. Huzagh:

"The Court: This is a final order when it is dismissed without prejudice.

Mr. Borkenhagen: The order then should show that it is dismissed on the motion of the defendant.

The Court: Right, certainly, it is his motion.

Mr. Huzagh: I am not going to make a motion.

The Court: You made it in open court.

Mr. Huzagh: I did move at the close of his case that the case be dismissed for lack of establishing a prima facie case.

The Court: Then * * * I will dismiss it on my own motion * * *. That's a final order.

Mr. Huzagh: There could be nothing more final."

Appellee contends that plaintiff consented to the order dismissing the cause without prejudice and thereby waived all right to object to possible errors or to take an appeal. Section 52 of the Civil Practice Act limits a plaintiff's right to voluntary dismissal of his suit, and provides that after a trial or hearing begins the plaintiff cannot dismiss except by consent or on motion specifying the grounds for dismissal, supported by affidavit or other proof, and then he can dismiss only upon terms fixed by the court, and the dismissal is a matter within the court's discretion. *Bauman v. Advance Aluminum Castings Corp.*, 27 Ill. App. 2d 178, 184. If the court had granted



plaintiff's motion for a voluntary dismissal without prejudice or costs, then plaintiff would have taken a non-suit and his only recourse would be to begin a new action. *Bettenhausen v. Guenther*, 388 Ill. 487, 489. Here, however, the court did not grant plaintiff's motion to dismiss. The cause was dismissed on the court's own motion, and the words "without prejudice" merely indicate that the suit was dismissed without a decision on the merits. *People v. Bristow*, 391 Ill. 101, 110.

From the colloquy between court and counsel it is apparent that all were attempting to terminate the trial with a final and appealable order. In effect plaintiff elected to abide by his complaint, the trial court on its own motion entered what he proclaimed was a final order, and appellee's counsel then conceded the finality of the court's determination. In our opinion the dismissal was not a consent order, but was entered so that plaintiff could have his rights passed upon by a court of review. *McDavid v. Fiscar*, 342 Ill. App. 673, 679.

Appellant's theory is that the trial court erred in interpreting section 2-3-5 to mean that before an area within a mile of an existing municipality may be incorporated as a village, the parties desiring incorporation must submit a formal petition to such municipality for its consent or seek annexation to the existing municipality. These were the views expressed by the trial court. However, the question before this court is not whether the action or ruling of the trial court was based upon proper grounds or reasons, but whether such action or ruling was correct. *Platz v. Walk*, 3 Ill. 2d 308, 318; *Balfour v. Balfour*, 20 Ill. App. 2d 590, 596.

On appeal from an order or decree of dismissal it is the action of the trial court which is under consideration and not the reasons assigned therefor, and where the dismissal is proper the reasons assigned by the trial court are immaterial, and the dismissal will be affirmed on any ground warranted by the record, notwithstanding the reasons given by the trial judge. 2 I.L.P., Appeal and Error, Par. 633.

The reasons or views expressed by the trial court are wholly immaterial on this appeal and are not before us for review. We express no opinion relative to the validity or invalidity of such views. The only substantive question presented for review on this appeal is the propriety of the trial court's dismissal of plaintiff's action. The record shows that the area sought to be incorporated was immediately contiguous to and within one mile of the boundary line of Willowbrook, an existing municipality. Unless the corporate authorities of Willowbrook consented to such incorporation, there was no statutory authority for incorporating the area. The complaint affirmatively shows that the corporate authorities of Willowbrook have not consented to the incorporation of the area in question. In the absence of such consent, plaintiff's complaint was substantially insufficient to show that the residents of the area were entitled to petition for incorporation under section 2-3-5 of the Illinois Municipal Code. Therefore, the trial court properly dismissed the cause of action, the order and decree of the County Court of DuPage County was correct, and is affirmed.

Affirmed.

DOVE, P. J., and SMITH, J., concur.

1st DIVISION

FEBRUARY TERM A. D. 1962

38 I.A.² 113

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Appeal from the
Circuit Court of
La Salle County.

Count I of the complaint charged the defendant with some 24 or 25 acts of negligence relating to crossing maintenance, weed cutting, obstructions, warning signs, whistle blowing, bell ringing, etc., as well as a general charge of negligent operation. Count II repeats these charges as wilful and wanton misconduct on the part of the defendant. With the exception of the general charge of negligence and of wilful and wanton misconduct, the acts or failures to act relate, (1) to matters designed to warn the plaintiff of the presence of the crossing, and (2) matters



designed to warn the plaintiff of the presence of the train. In our view of this case those charges relating to defendant's duty to warn plaintiff of the crossing and of the train are of little import. The evidence is uncontradicted that the plaintiff saw the train when 400 feet or more from the crossing. The train crew saw the plaintiff's car when it was a quarter of a mile or more from the crossing. With this perceptibility on the part of each, the propriety of the directed verdict necessarily rests on the conduct of each party after each became aware of the presence of the other.

We are thus confronted, as was the trial court, with a question of law as to whether or not, when all of the evidence is considered together with all reasonable inferences to be drawn therefrom in its aspects most favorable to the party against whom the motion is directed, there is a total failure to prove one or more of the essential elements of the case. *Tucker v. N. Y. C. & St. L. R. R. Co.*, 12 Ill. 2d 532; 147 N. E. 2d 376. If it may be said that reasonable minds, fairly considering the evidence within the confines of the foregoing rule, would reach the conclusion that one or more essential elements of plaintiff's case was not proven then a question of law is presented. If the evidence so considered is such that reasonable minds might well differ, then the issue is one appropriately for the jury and the directed verdict was in error. With these considerations in mind we first examine the conduct of the plaintiff.

Plaintiff, then 19 years old, had worked from 8 o'clock until about 5 P. M. on the day of the accident as a garage mechanic. He returned to his home, watched television until about 9 P. M. and then went to Cherry, Illinois and worked on a second car of his until about 1 A. M. At about 1:15 A. M. he approached the scene of the accident on a blacktop, secondary, rural highway in his 1951 Packard car. This car was in good mechanical condition. Plaintiff drove with the windows up and

the radio on. He was familiar with the crossing and had crossed it some fifty times before. The road bed was dry and the night clear and dark without a moon. Plaintiff approached the railroad tracks from the North and was proceeding South. The railroad tracks intersect the roadway at an approximate 45° angle and run in a northeasterly-southwesterly direction. The train, consisting of an engine and caboose, was engaged in a switching operation and moving from the southwest to the northeast. The blacktop road was about 30 feet in width.

Plaintiff testified that he saw the train four hundred feet or more before he reached the crossing. The train was then 45-50 feet from the crossing and to his left. He then thought it was stopped. Later he said that his lights shone on the train at about 400 feet and that he thought it had cleared the crossing and was proceeding to his left. He was then travelling 55 to 65 miles per hour. At this point he let up on the gas. When about 250 feet from the crossing the train started to move and he slammed on his brakes but "was unable to stop until he struck the caboose". He turned to his right before he reached the crossing, left the highway, struck a railroad cross buck sign and then collided with the side of the caboose. He was not on the highway at the time of the collision. The speed of his car at the 250 foot mark and at the time of the impact is not revealed by the record. The photograph of the car shows extensive damage to it and his own injuries were severe.

Plaintiff attempted to call the train crew as adverse witnesses under Sec. 60 of the Civil Practice Act. (Ill. Rev. Stat. 1961, Chap. 110, Par. 60) Since they were not parties to the suit, nor within the terms of Sec. 60, the court sustained an objection to calling them, and they testified in chief as plaintiff's witnesses. They testified that they were engaged in a switching operation with a two car train consisting of an engine and a caboose. The engine was facing the crossing and was pushing the caboose backwards so that the rear of the caboose reached the crossing

first. The fireman was in the cab on the side of the engine from which the plaintiff's car was approaching. The fireman first saw the car when it was a half or a quarter of a mile from the crossing. At that time the train was just coming out of the switch some 300 feet from the crossing and was moving 5 to 10 miles per hour. Just before the caboose reached the crossing the engineer received a second "back-up" signal. At that time plaintiff's car was 200-300 feet from the crossing. The train picked up speed. At this point the fireman told the engineer that "there was a car coming fast". The engineer replied that "he had the back-up signal" and continued the train movement.

The brakeman was on the rear of the caboose with a lantern. He testified that the train was 10 to 15 feet back from the crossing when the second "back-up" signal was given and that plaintiff's automobile was then 600 to 700 feet from the crossing. Neither crewman made any estimate as to the speed of the car. The brakeman further testified that the caboose was 30-40 feet in length and was completely over the crossing and west of it, at the time of the impact.

Over the objection of the plaintiff the members of the train crew were permitted to testify that the light on the engine was on and shone over the caboose, that the bell was ringing and the whistle was blowing, that a flare fusee had been placed on the rear of the caboose and that the marker lights on the side of the caboose were on. This evidence was objected to on the grounds that it went beyond the scope of the direct examination. That cross-examination should be limited to matters to which the witness testified in chief has long been recognized in Illinois. "Actually the application of the rule has been so liberal and the discretion recognized so great that it may be questioned whether the rule in fact exists except as a rule of thumb for trial judges." Handbook of Illinois Evidence, Cleary, (Little, Brown and



Company, 1956), Page 7, Par. 1.9. While the rule is a salutary one for the trial judge in the orderly presentation of the evidence and its range is largely left to his discretion, its use or non-use is not subject to criticism unless some prejudice to the party against whom it is invoked is discernible. The scope of the "matter" testified to on direct examination should not be given a narrow or technical application. *Muscarella v. Petersen*, 20 Ill. 2d 548, 170 N.E. 2d 564. The crew members were asked where they were, what they were doing and what they observed. It would seem to be a corset-like restriction on the rule to limit cross-examination to some things observed at the scene and preclude cross-examination as to other matters equally observable at the scene. The testimony here elicited can scarcely be termed either surprise or incompetent testimony. Furthermore, the testimony is relatively unimportant in this case. It relates solely to matters calculated to warn the plaintiff of the presence of the train. His own testimony conclusively shows that he saw the train while 400 feet away. He testified that he neither saw the lights nor heard the bell and whistle--yet he saw the train 400 feet away and either instinctively or intentionally let up on the gas. "Perceptibility, therefore, is an important element in the general rule--that the presence of the train is adequate 'notice' or 'warning'." *Petricek v. Elgin, J & E. Ry. Co.*, 21 Ill. App. 2d 60, 65. Even giving probative value to plaintiff's negative statement that he neither saw the lights nor heard the bell or whistle, perceptibility was present. He did see the train at 400 feet, lights or no lights. He did see the train moving toward the crossing in front of him, lights or no lights, when 250 feet away. Under these circumstances we see no abuse of discretion in permitting the cross-examination nor do we see how the plaintiff was in any way prejudiced as a result thereof.

"It is well settled that railroad crossings are dangerous places, and that in crossing them a person must approach the track with the degree of care proportionate to the known danger. The law requires that the traveller make diligent use

of his sense of sight and hearing and exercise the care commensurate with the danger to be anticipated." *Tucker v. N. Y. C. & St. L. R. R. Co.*, *supra*, 535; *Overman v. Illinois Central Railroad Company*, 34 Ill. App. 2d 30; 180 N.E. 2d 213. This is merely a judicial expression of the accepted and proper conduct expected of the travelling public. It owes its birth to the every day experience of, and is known to, all mankind. Its application to the myriad of railroad crossing cases depends upon the facts and circumstances of each case. Each case presents its own factual picture.

The rules prescribing the setting of the judicial microscope through which we must view the evidence have been too often stated to warrant repetition or undue discussion here. *McKindree v. Christy*, 29 Ill. App. 2d 195, 172 N.E. 2d 380; *Lester v. Hennessey*, 29 Ill. App. 2d 11, 172 N.E. 2d 403; *Stowers v. Carp*, 29 Ill. App. 2d 52, 172 N.E. 2d 370. Reasonable minds would surely agree that the conduct of the plaintiff, thus portrayed, constitutes a want of due care on his part and bars his recovery on the negligence count of his complaint. He saw the train 400 or more feet away. Instinctively or otherwise he was then aware of possible danger. Instinctively or otherwise, he let up on the gas. He thought the train was stopped. It wasn't. He thought the train had cleared the crossing. It hadn't. At 250 feet he recognized the error of both conclusions and slammed on his brakes. Why he could not then stop stands unexplained in this record. His car was in good mechanical condition. Three days before he had worked on the brakes. If 400 feet back he was traveling 55-65 miles per hour and had let up on the gas, certainly his speed was somewhat less at 250 feet, yet he turned off the road, drove through a cross buck sign and struck the caboose sufficiently hard to rock it on its wheels and to completely demolish his car. This evidence is undisputed. Surely reasonable minds would agree that his conduct does not measure up to the conduct

of a reasonably prudent person under the circumstances. He did not have his car under that control reasonably to be expected of any prudent motorist under like or similar circumstances. There is an utter failure on his part to establish, directly or by reasonable inference, that he was in the exercise of due care for his own safety. Accordingly, the motion to direct a verdict on Count I of the complaint was proper. Whether or not defendant was negligent presents a jury question, as the inferences are uncertain, but this issue now becomes moot, and further discussion apropos thereof needless.

On the wilful or wanton count, there is no double standard for the plaintiff and the defendant. It is apparent from the evidence that twice the plaintiff erred in the conclusions he drew from the physical facts before him. We are reluctant to brand these errors as wilful and wanton misconduct as a matter of law. They were, as we have held, contributory negligence barring recovery on Count I. By the same tests we are reluctant to hold that the conduct of the defendant constitutes wilful and wanton misconduct as a matter of law, presenting a question of fact for the jury. If the plaintiff's errors were ordinary negligence, so were those of the defendant, and plaintiff fails in his proof of wilful and wanton misconduct on the part of defendant. If defendant's errors of judgment were wilful and wanton misconduct, so were the plaintiff's. In either event, plaintiff fails to prove a necessary element of his cause of action and the trial court was correct in directing a verdict on Count II.

We are of the opinion that the trial court properly directed a verdict on both counts and its judgment entered thereon is accordingly affirmed.

DOVE, P. J. and McNEAL, J. concur.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
May Term, 1962

CHARLES P. HAMILL, JR.,	)	Appeal from the
Petitioner-Appellant,)	
	)	Circuit Court of
v.)	
	)	St. Clair County,
JANET B. HAMILL,)	
Respondent-Appellee.	)	Illinois.

Honorable Richard T. Carter, Judge Presiding

HOFFMAN, JUSTICE

Charles P. Hamill, Jr. appeals from an order denying his petition for modification of a decree of divorce insofar as it related to child support payments in the sum of \$40.00 a week. The decree of divorce was entered January 27, 1961. The petition for modification was filed October 14, 1961.

In the original divorce decree, the court awarded custody of the 2 minor children of the parties to the wife and required the husband to pay \$20.00 a week for the support of each child. In addition, he was to pay outstanding medical bills and all further extraordinary medical expenses not exceeding \$25.00 at any one time. The petitioner was not in default in any of these payments.

At the time he filed the present petition, and as a basis for asking the court to modify the decree, defendant testified that he was unemployed, and that since the decree, he had lost \$160.00 a month income under the G. I. Bill of Rights which he had been receiving

while attending school. Though unemployed, petitioner had an estimated income of nearly \$3,000.00 in 1961 from stock and bond interest and dividends. The payments of \$40.00 a week for the support of the 2 children came, he said, from his father. At the time of the hearing on the petition, he was living in a house furnished by his father, driving an expensive automobile, and spending more than \$40.00 per week just for his entertainment, telephone and automobile expenses.

The wife testified that she secured employment earning her \$4,000.00 per year, but that her expenses for the children, which included a substantial amount for babysitting, exceeded the amount petitioner contributed.

Petitioner contends that the loss of the G. I. income was a change in circumstance commanding a modification of the decree. The wife claims that the cost of attending school was in excess of the financial benefits received; and that actually the defendant's financial change was for the better and not for the worse. The G. I. benefits were terminated because petitioner voluntarily ceased going to school in August, 1961.

The usual principles applicable are brought to our attention. The petitioner argues that the income of the wife, as well as the income of the husband, must be taken into consideration in determining the amount a person should pay for child support. He further states that a private agreement of the parties respecting child support is not controlling upon the Court.

This Court pointed out in *Patterson v. Patterson*, 28 Ill. App. 2d 76, 170 N. E. 2d 11, that the issue on a petition such as is

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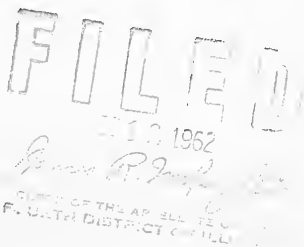
involved here is whether there have been material changes in the circumstances of the parties since the entry of the original decree, and the burden of proof is upon the applicant to show such material change in circumstances as would justify modification. Where no evidence of a change in the financial condition of the parties is offered in evidence, the petition must be denied.

What is the change in circumstances relied upon by petitioner here? Merely that he has lost income paid him by the Government under the G. I. Bill of Rights while attending school. However, he has failed to show that this termination of benefits adversely affected his financial condition. His own testimony is that the costs of attending school exceeded the G. I. bill payments. The order below found that there was an insufficient showing of material changes in circumstances to warrant a modification of the decree. It is supported by the evidence and the denial of appellant's petition will be affirmed.

Affirmed.

Scheineman, P. J., and Culbertson, J. Concur.

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May Term, A.D. 1962

38 I. A. 2 190

Appeal from the
Circuit Court of
Ogle County.

The complaint charged specifically (1) that defendants operated the tractor-trailer, at and immediately before the accident, at a dangerous and unsafe rate of speed under the road and weather conditions then existing; (2) that defendants failed to have the tractor-trailer under proper control, and (3) that defendants operated their vehicle on the wrong side of the highway. The

answer of the defendants denied all charges of negligence and the issues thus made were submitted to a jury resulting in a verdict in favor of the defendants. Judgment was entered on this verdict and plaintiff's post-trial motion was thereafter denied and this appeal follows:

The evidence disclosed that upon the night in question the plaintiff was driving his automobile in a northerly direction on State Route 2, and had arrived at a point about three miles north of Oregon, Illinois. At this place, referred to in the testimony as Mud Creek and Mud Creek Bridge, guardrails on both sides of the bridge and on both sides of the highway had been erected. The defendant, Ervin A. Snyder, was driving a tractor-trailer belonging to defendant, Julius F. Kanz, in a southerly direction on this Route. The accident occurred on a banked curve near the Mud Creek Bridge. Mr. Snyder, was driving the tractor-trailer on the right hand side of the road which was the high or banked side of the curve. As he rounded the curve, going south, he was driving about 25 miles per hour and turned his truck slightly to bear with the curve. The curve is a long sweeping one and slopes from the west to the east. The tractor-trailer, as it rounded the curve, started to skid from the west to the east, that is, from the high or banked side, to the low side of the highway. At the time the truck started to skid, plaintiff's car was some fifty to seventy-five feet in its proper lane of traffic proceeding in a northerly direction.

Mr. Snyder testified that he was driving from Merton, Wisconsin to Cedar Rapids and Ottumwa, Iowa; that the roads were dry and in good shape until he left Rockford when it started to rain and "was freezing as fast as it come down"; that when he arrived at Byron he stopped at a restaurant and then proceeded, on Route 2, and had only driven a few miles when the accident happened. As

abstracted this witness continued: "Well, as I come into this curve, this left curve, and the road is banked there, the truck slid out of my lane down into the oncoming lane of traffic. I could feel it start to slide down toward the other lane and there was a car coming, Mr. Munz's car, and well, there was nothing I could do. I tried to hold the wheel firm, to hold it there. It slid right down in front of his car. The truck slid down and I couldn't steer it or anything, so just, about the time that I hit him I jumped from the truck because I thought both were going in the river down there".

Mr. Snyder further testified that as he approached the bridge he noticed the lights on plaintiff's car and that they were, 100 feet away when the defendant's truck went into the other lane of traffic. As a result of the collision, plaintiff's automobile was demolished, and plaintiff sustained personal injuries.

Counsel for plaintiff argues that the evidence shows that this was not an unavoidable accident, but discloses that defendant, was driving a loaded tractor-trailer outfit knowing that the highway was covered with ice and was slippery, that he drove his unit around a curve at a speed which, under the conditions existing, was either too fast or too slow, which caused the unit to skid, and that when the unit started to skid, defendant did nothing to control his unit, but instead jumped out of the cab because he thought that it was going into the river.

Counsel for defendants insist that the evidence discloses that Snyder was helpless when his tractor-trailer started to skid; that he did everything that he could do to keep it in its proper lane of traffic, but without any fault or negligence on his part and solely because of the condition of the highway the unit he was driving skidded into the traffic lane where plaintiff was operating his car.

In Bradley vs. Thomas M. Madden Co., 333 Ill. App. 153, 76 NE 2d 797, it appeared that plaintiff was driving an empty hearse in the south half of a four lane pavement. He was going about twenty miles an hour in an easterly direction. It was about noon and the defendant was operating his pick-up truck in a westerly direction on the north half of the Highway traveling at about the same rate of speed. The pavement, according to the evidence, was covered with "a glare of ice" or was "icy in spots". The driver of the defendant's truck had both hands on the steering wheel, his foot was on the accelerator and he was looking straight ahead. The rear end of his truck started to skid to the left, which was to the south. The driver turned his front wheels to the left and then applied his brakes but his truck continued to skid. The two vehicles were about seventy-five feet apart at the time skidding commenced, and the pick-up truck continued to skid until it collided with the hearse while the hearse was proceeding in its proper lane of traffic. Plaintiff obtained a judgment in the trial court. The Appellate Court reversed the judgment and held that the defendant was not guilty of negligence merely because his motor truck skidded over the center line of an icy highway and struck plaintiff's vehicle. The court stated that, under the facts and circumstances disclosed by the evidence, the defendant did not have the absolute duty of keeping his truck in the north half of the highway.

In Ferdinand vs. Lindgren, 32 Ill. App. 2d 133, it appeared that plaintiff's automobile was stopped at an intersection in Peoria, in obedience to a traffic signal and was struck in the rear by a car driven by defendant. Plaintiff sought to recover damages from the defendant for the alleged injuries he sustained

as a result of the impact. The accident occurred in the afternoon of January 13, 1957. The streets were icy and defendant was proceeding at a speed between five and ten miles per hour and when he reached a point four car lengths to the rear of plaintiff's stopped car he applied his brakes but was unable to stop his car and the front end of his car hit the rear portion of plaintiff's car. The jury found the issues for the defendant and this court, in affirming the judgment rendered on that verdict, stated that under the evidence found in the record the jury might well have found the defendant to have been in a helpless position just as the jury found in *Palmer vs. Poynter*, 24 Ill. App. 2d, 68,72, 163 N.E. 2d 851.

The opinion in the *Ferdinand* case refers to an article on skidding and negligence authored by Honorable Hal M. Stone of the McLean County Bar in which the author concludes that the mere fact that an automobile has skidded is not indicative of actionable negligence; that proof that the driver of the car was proceeding at a reasonable speed, and that he had reasonable control of the car under all the circumstances, may, with other facts appearing in evidence, convince the jury that the collision occurred without fault on the part of the defendant.

The instant case, as the *Ferdinand* case, was tried by the plaintiff and the defendant on the theory that the question of liability was based on defendant's negligence. Upon oral argument counsel for appellant stated that the only question presented by the record was whether the judgment appealed from was manifestly against the weight of the evidence. Whether defendant, Snyder was guilty of negligence in the manner in which he operated the tractor-trailer upon the occasion in question,

presented a question of fact. It is the exclusive function of the jury to determine questions of fact and to withdraw such fact questions from the consideration of the jury is to usurp its function. (Ney vs. Yellow Cab Co., 2 Ill. 2d 74, 84; Lasko vs. Meier, 394 Ill. 71).

The judgment of the Circuit Court of Ogle County is affirmed.

Judgment affirmed.

McNEAL J. CONCURS.

SMITH J. CONCURS.

May Term, A.D. 1962

38. I. A. 2 191

Defendant-Appellee.

Appeal from the
Circuit Court of
Winnebago County.

On May 11, 1961 Mrs. Doty filed her petition alleging that \$4860.00 was due her under the provisions of the decree and praying for an order requiring defendant to show cause why he should not be held in contempt of court and also prayed that the decree be modified by increasing the support payments to \$30.00 per week.

On May 15, 1961 defendant filed a cross-petition alleging that a change in the circumstances of both parties had taken place since the decree was rendered, averring that plaintiff was not a suitable person to retain the custody of the two children and praying for an order awarding him their custody. Plaintiff's answer to this cross-petition denied that she was not a suitable person to have the custody of the children and denied that the change of circumstances of the parties warranted the modification of decree.

On August 28, 1961 a hearing was had. Statements were made by counsel and during a rather informal discussion, after it appeared that both parties had remarried and that plaintiff had had three children by her second marriage and that defendant had one step-child, the court stated that it was a big job to raise five children and indicated that it might be advisable to temporarily award the custody of Marla and Sheila to the father. At this juncture Mrs. Doty said: "Judge Dusher, you are not going to take my two girls and give them to him, are you?" The court replied that he was trying to find out the best way to take care of the children. At this hearing, at the suggestion of counsel for plaintiff the court appointed Muriel Shannon to make an investigation of the homes of the respective parties and the ability of the parties to care for and support the children. At this hearing the court conferred, in his chambers, with plaintiff and defendant but after his conference he stated that nothing was accomplished as each party desired the custody of the two children. The hearing was then adjourned to August 31, 1961. On that day the report of Mrs. Shannon was filed and the hearing resumed.

At the conclusion of the hearing on August 31, 1961, the court entered an order finding that plaintiff is a suitable person to have the custody of the children but that their best interests required that their custody be changed. The order modified the provisions of the former decree and awarded the father their custody "to and until the expiration of one week from the closing of the school term in the month of June, 1962 at which time the custody of the children shall be subject to the further order of the Court". To reverse this order plaintiff appeals.

From the report of Mrs. Shannon and from the testimony of the plaintiff and defendant, who were the only witnesses, it appears that the parties were married on July 25, 1952. At the time of the hearing on August 28, 1961, plaintiff was 24 or 25 years of age and defendant 29. As a result of this marriage Marla Stickler was born December 3, 1953 and Sheila Stickler was born January 15, 1955. On December 7, 1955 plaintiff was awarded a divorce from her husband and the decree awarded her the custody of the two children and directed defendant to pay \$10.00 per week per child for their support and granted to defendant the right to visit the children each Sunday.

Shortly after this decree was entered the defendant left the State of Illinois and went to Omaha, Nebraska, where he remained until October, 1956. On October 8, 1956 plaintiff married Jack Doty. On December 2, 1957 defendant married and he resides with his wife and step-daughter in a modern ~~sixteen thousand~~ home. On October 26, 1956, the plaintiff and her husband, Jack Doty, and the defendant signed an agreement by the provisions

of which defendant consented to the adoption of said children by Mr. and Mrs. Doty in consideration of plaintiff releasing defendant from all child support. The adoption, however, was never completed. About the time this agreement was executed and in October, 1956, defendant did pay his wife \$485.00 which is the only money ever paid her by defendant after the rendition of the decree for divorce on December 7, 1955.

As a result of plaintiff's marriage to Jack Doty three children were born. On July 1, 1960 Mr. and Mrs. Doty were divorced and she was awarded the custody of their three children and he was ordered to pay her \$15.00 per week for the support of each of the three children. For three years prior to the instant hearing plaintiff and her five children have been living in a basement home which Mrs. Shannon reported was an adequate home. Directly across the street from this home is the residence of the parents of plaintiff and her grandmother lives in another residence nearby.

The record further discloses that plaintiff is employed as a waitress at Sweden House Restaurant from 4:00 p.m. to midnight six days per week and her take home pay is \$50.00 per week, out of which she pays a baby-sitter. Defendant is employed at the J.I. Case Company and his take-home pay is about \$102.00 per week. His wife is employed at National Lock Company and earns \$65.00 per week. Defendant testified that he desired to have custody of these children because he believes he is in a better position to take care of them than his former wife. The plaintiff maintains, that, if she receives some child support from defendant she can manage very well with what she is able to earn and with some assistance from her family.

Defendant testified that his home is modern and contains seven rooms; that there is a mortgage on this home on which there is an unpaid balance of \$4,000.00; that he pays \$120.00 a month on this mortgage; that there is an unpaid balance of \$2,400.00 on his automobile which he is paying at the rate of \$84.00 per month; that the balance due on his furniture is \$200.00 upon which he pays \$24.00 a month and that he also pays \$28.00 a month on a small loan. He further testified that his two children, Marla and Sheila, know his present wife but that he had not seen them since, August, 1960, nor had he made any effort to see^{them} and had paid nothing toward their support since his payment of \$485.00 in October, 1956. He estimated that he had seen the children twenty to twenty-five times in the last two years.

Plaintiff testified that the two girls are average, active children for their age; that the school bus picks them up every school day and that Marla is on the honor roll at school and Sheila "is smart for her age"; that both children attend Harlem Methodist Church regularly; that within a short time her grandmother expects to vacate her modern four room home and live with plaintiff's parents and that then plaintiff will move into the house vacated by her grandmother.

At the time the original decree of divorce was entered on December 7, 1955, the Court found that plaintiff was a fit and proper person to have the custody of the two children and awarded their custody to her. Upon this hearing almost six years later the only evidence found in this record is that plaintiff is a fit and proper person to have the custody of these children and the order appealed from so finds.

A decree of Divorce is res judicata as to the facts which existed at the time it was entered but not as to facts arising thereafter. (People ex rel Stockham vs. Schaedel, 340 Ill. 560). To justify a change of custody new conditions material to the issues must have arisen (Stafford vs. Stafford 299 Ill. 438), and compelling evidence must be presented proving either that the mother is an unfit person, or that to deny custody to the mother would be for the best interests of the child. (Nye vs. Nye, 411 Ill. 408; Arden vs. Arden, 25 Ill. App. 2d 181).

At the time the divorce was granted one of the children was less than a year old and the other, two years of age. The evidence is that the mother of these children has provided an adequate home for these children and that she has done so without any contribution from their father since October, 1956. There is a difference in the financial situation of the parties but that is not controlling. Had the defendant paid the required weekly support payments as ordered by the decree of 1955 perhaps there would be no such disparity.

What this record discloses is that after the lapse of nine months following the entering of the decree of divorce which awarded plaintiff custody of her two minor children and directed him to pay something toward their support, defendant left the jurisdiction of the court and paid nothing. When he returned to Illinois he paid \$485.00 and in consideration of being released from making any further payments for their support he consented to their adoption and until he was cited into court upon the petition of the mother of his children, who sought to have the provisions of the decree enforced, he was perfectly

content with the home where his children were living and with the care and attention his children were receiving from their mother. It is clearly apparent that defendant's deepest concern is to be relieved from making any contribution for the support of his children. To uproot these children from the only home they have ever known, separate them from the companionship and love of their mother and their three half-brothers and place them with their father who did not see them for nine months immediately following the entry of the decree for divorce, who had not seen them for a year immediately preceeding the instant hearing and who had only seen them twenty or twenty-five times in almost two years and with a step-mother who had only seen them, but whom they did not know and with a step-sister with whom they had no acquaintance is unthinkable.

The chancellor was presented with a difficult situation. In disposing of the case he stated that he was not granting permanent custody of these children to their father but that he believed the best thing to do at that time would be to let the father have the children for a year; that the mother was going to move into a new home but did not have sufficient income to properly care for so many children and that five children were just two more than plaintiff could take care of and support. He concluded by stating: "Girls need their mother and a mother is better able to care for her children than a step-mother". The chancellor considered that the order he entered was interlocutory rather than a final appealable one but the authorities are otherwise. (Kulan vs. Anderson, 300 Ill. App. 267; Schneeman vs. Schneeman, 317 Ill. App. 286).

In People vs. Weeks, 228 Ill. App. 262 a father sought to obtain the custody of his twelve year old daughter, Kathryn, who had been in the possession and charge of his sister for nine years. In reversing an order of the trial court which awarded her custody to the father, the appellate court said, (p. 271): "If Kathryn is given over to her father she necessarily would be in a very different domestic atmosphere from that she now lives in. Her father at work in the day time, she would be left to the sole association of her step-mother and infant half-sister. The solicitude that her aunt now and for so many years has shown for her would be missing. For sometime, at least, she would miss the presence and help of her aunt and her aunt's sincere affection. That would mean to her now, when the mind is impressionable, and in the need of the steadying influence of some one she wished to please and ^{to} confide in, great loss, and, it might be, a grievous harm".

So, in the instant case, to give the custody of these girls, now nine and eight years of age to their father with whom they have not lived since they were infants, and place them in an entirely different environment than that to which they have been accustomed, separate them from their mother and half-brothers, with whom they have lived for so many years and place them in a home where their father and step-mother would be at work during the day time and where the only other child would be the daughter of their step-mother would be most distressing to the mother ^{children.} of these/ The happiness and well being of these children requires that they remain with their mother.

People vs. Jenkins, 34 Ill. App. ^{2d} 255 was a habeas corpus proceeding by which a father sought to secure the custody of his son, Scotty Hermann, ten years old, who had spent his entire life with his maternal grandparents. The trial court denied

custody to the father and in affirming the judgment of the trial court, this court (p. 255) called attention to the fact that the record disclosed that Scotty had been in the exclusive control and custody of his grandparents since his birth; that they had ministered to his every need and nurtured, cared for and furnished him with shelter, clothing, medical care, food and every material thing a growing child required; that they directed his physical, mental, spiritual and religious education and lavished upon him their love and affection and that this arrangement was entirely satisfactory to the father for more than eight years. It was held that the best interests of Scotty required that it be not discontinued.

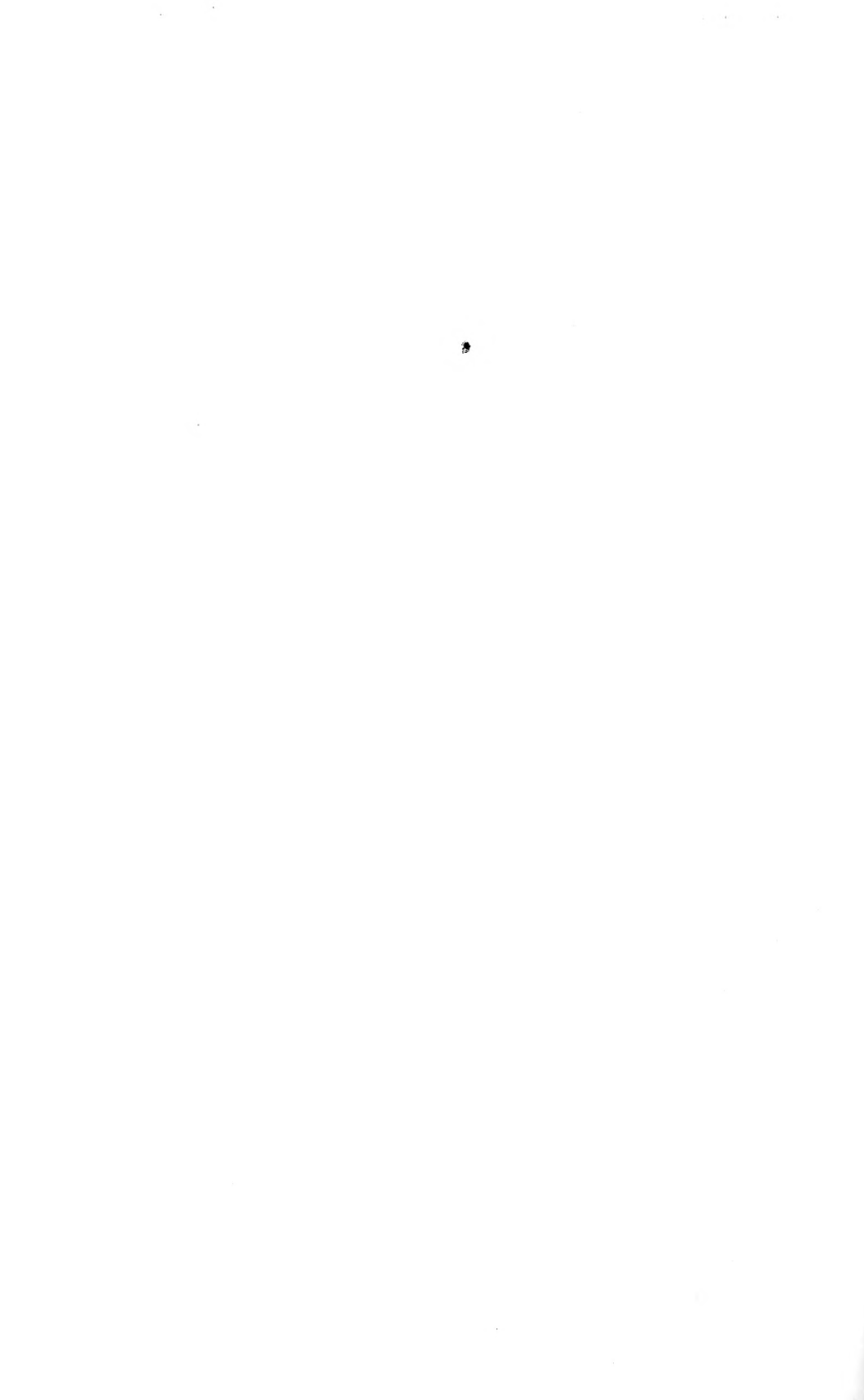
So, here, the Mother has had control and custody of each of these two children since birth; that she has ministered to their every need and nurtured, cared for and furnished them with a home, shelter, clothing, medical care and every material thing these two growing children required. It was the mother who directed their physical, mental, spiritual and religious education and gave to them her love and affection. This arrangement was entirely satisfactory to the father from the time of the divorce, December 7, 1955 until May 15, 1961 when he filed his cross-petition by which he sought to have the custody of his two children awarded to him. At that time, \$4860.00 had accrued under the provisions of the divorce decree which he had been directed to pay for the support of his children but which he had not paid. Perhaps Mr. Stickler does have the normal parental love for his children. It is impossible for anyone to determine the amount or quality of the love and affection a father may have for a child with whom he has never had any close association and in whose presence he has only been occasionally. The natural instincts of love, care and interest of this mother for her children and the best interests of these children require that their custody which was awarded her on December 7, 1955, be not discontinued.

Counsel for appellee insist that this order should either be affirmed or the appeal dismissed because the Report of trial proceedings was not presented to the trial court within the time prescribed by our rules and that the Record on Appeal was not filed in this court until long after the time provided by law. What this record discloses is this:

The order appealed from was filed in the office of the Circuit Court on September 15, 1961, nunc pro tunc as of August 31, 1961. The notice of appeal, with proof of service was filed on September 12, 1961. The praecipe for the record with proof of notice, which called for a report of the trial proceedings to be included therein was also filed on September 12, 1961. On the same day plaintiff filed her motion requesting the court to fix the amount and conditions of an appeal bond in order that the notice of appeal would operate as a supersedeas, together with notice to opposing counsel that the motion would be presented to the court on September 15, 1961 at 9:30 o'clock a.m.

On September 15, 1961 the defendant filed his motion reciting that the order sought to be appealed was not a final order and moved the court to enter an order dismissing the appeal. On the same day plaintiff filed her motion to strike defendant's motion to dismiss the appeal. A hearing was had the same day and an order was entered dismissing this appeal.

On April 20, 1962 in obedience to an order entered by the Supreme Court of this State, this order of September 15, 1961, dismissing this appeal was expunged from the records of the Circuit Court of Winnebago County and an order was entered fixing the amount and conditions of the appeal bond. The appeal



bond was duly filed and approved on April 26, 1962 and the order approving said bond provided: "the notice of appeal heretofore filed herein be and the same shall operate as a supersedeas".

The report of trial proceedings was certified by the trial court on June 6, 1962 and filed that day in the office of the Circuit Clerk and on the following day, June 7, 1962 the record on appeal was filed by the Circuit Clerk and on June 14, 1962 was filed in this court.

Had a Report of trial proceedings been presented to the trial court for certification prior to the time the void order dismissing this appeal was expunged from the record of the circuit court it is not an unreasonable inference that the trial court would have declined to certify to it as he had refused to fix the amount and conditions of an appeal bond and dismissed the appeal, his position being that the order of August 31, 1961 was not a final, appealable order.

In the course of its opinion in the mandamus case (People ex rel vs. Dusher, 24 Ill. 2d 309, 181 N.E. 2d 166) the Supreme Court said: "Since the order of dismissal was unauthorized and void, the petitioner might have proceeded with her appeal as if the order had not been entered.----- The question of custody was the question involved in the litigation and petitioner had a right to have the decision thereon reviewed by appeal".

Under the facts disclosed by this record this court should dispose of this case on its merits and not dismiss this appeal. Appellant's brief and argument and the abstract of

the record were filed in this court on July 14, 1962. Appellee joined in this appeal and his brief and argument was filed on August 2, 1962 and appellant's reply brief filed on August 13, 1962. In appellee's brief counsel state that the propriety of the order appealed from has become moot and hypothetical as the order provided the custody of these children should be subject to the further order of the court after the expiration of one week following the closing of the school term in June, 1962. We do not think so. The evidence does not sustain the findings and order of the trial court and appellant is entitled to have that order reversed and when reversed the provisions of the original decree, under which she retains custody of her children, speaks from the date it was entered.

The record does disclose that at the beginning of the second hearing on August 31, 1961, counsel for appellant stated that his client "forgives all claim to the arrearage of \$4860.00 but that she was requesting the enforcement of the provisions of the original decree and that defendant be required to pay plaintiff \$20.00 per week for the support of the two children". The issues made by her petition and the answer of the defendant are still pending and undetermined in the trial court. The chancellor erred in entering the order appealed from and that order is reversed.

McNEAL, J. CONCURS.

SMITH, J. CONCURS.

ORDER REVERSED.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
May Term, A.D. 1962

38 I.A.² 192

RICHARD L. LONG,)	
Plaintiff-Appellant,)	
vs.	)	Appeal from the
	)	Circuit Court of
ANTHONY L. SCHMIEG, RALPH W.)	
SNYDER and CITY OF HIGHLAND	)	Lake County, Illinois
PARK, ILLINOIS, a Municipal)	
Corporation,)	
Defendants-Appellees.)	

DOVE, P.J.

By his amended complaint, plaintiff, Richard L. Long, sought to recover \$7,695.25 from the defendants, City of Highland Park, Anthony L. Schmieg, its Chief of Police and Ralph W. Snyder, its City Manager, for coercing plaintiff to dismiss his application for adjustment of his claim which he had filed with the Industrial Commission against defendant, City of Highland Park. The trial court dismissed the action upon motion of the defendants and from an appropriate final judgment, entered against the plaintiff, the plaintiff appeals.

By his amended complaint, plaintiff alleged that on August 25, 1956, and prior and subsequent thereto, he was employed by the defendant City of Highland Park as a police officer; that on or about that date and while he was carrying out his duties

as such police officer, he suffered injuries to his right arm, elbow, shoulder and wrist; that his injuries occurred as a direct result of an accident arising out of, and in the course, of his employment; that on that date he was on duty as a police officer; that the defendant, Anthony Schmieg, Chief of Police of Highland Park, ordered him to arrest a drunk who was creating a disturbance; that while attempting to carry out these instructions, he was violently assaulted by the drunk, and as a result thereof sustained severe injuries and as a consequence thereof he was totally disabled for a period of seventeen days and suffered a permanent, forty percent (40%) loss, of the use of his right arm.

The amended complaint further alleged that he, the plaintiff, had a legal right to file, and on October 22, 1957, did file, with the Industrial Commission/^{his application} for adjustment of his claim for compensation; that the City of Highland Park, was liable to him under the provisions of the Workmen's Compensation Act of this State, for the injuries he sustained and charged that the defendants were under a legal duty not to interfere with his free exercise of the rights provided him by the Workmen's Compensation Act of this State.

The amended complaint then alleged that between October 22, 1957, and November 1, 1957, defendant Anthony Schmieg, in his capacity as Chief of Police of defendant City of Highland Park and as plaintiff's superior, inquired of plaintiff if he thought that the filing of the Workmen's Compensation Claim was "fair" to the City and told plaintiff that it was not a good idea for him to sue his employer and that, if he went through with his claim, his standing in the department would be affected and that plaintiff should realize that he, Anthony Schmieg, was "only

human", and that plaintiff's action would reflect in the loyalty category on his performance reports, which would affect adversely his chances for raises in pay. It was then alleged that upon inquiry by plaintiff, as to whether his future promotions would be affected, defendant, Anthony Schmieg, told him to "draw his own conclusions" and added that defendant, Ralph W. Snyder, City Manager of defendant, City of Highland Park, was in complete accord with his position.

It was then alleged that between November 1, 1957 and December 1, 1957, defendant Anthony Schmieg told "Sgt. Mike Bonamarte, a fellow officer and friend of plaintiff, that plaintiff had been told that if he continued to prosecute his Workmen's Compensation Claim, he would be through in this department" and that this statement was made to Bonamarte with the "certain knowledge" that it would be transmitted by Bonamarte to plaintiff, which, in fact it was.

It was then alleged that defendant Anthony Schmieg had sole discretion, subject only to the overall supervision of defendant, Ralph W. Snyder, over the granting of raises and promotions to police personnel; that once or twice a month from December 1, 1957 to April 15, 1958, defendant Anthony Schmieg inquired of plaintiff if he had decided to drop the Workmen's Compensation Claim; that between April 1, 1958 and April 15, 1958, plaintiff received a performance report from defendant, Anthony Schmieg, which was excellent in all categories except "loyalty" which was below average; that the defendant Anthony Schmieg, explained the report to plaintiff and told him that it was not "loyal" to file claims against the City, because, if they were upheld, the City's insurance carrier would have to satisfy them, which would cause its insurance premiums to rise.



It was then alleged that prior to April 15, 1958 and, as a result of this report, plaintiff was refused a raise in pay to which he would otherwise have been entitled; that, as a result of the malicious and unlawful duress set forth in the amended complaint, plaintiff stood in grave fear of being denied substantial future economic benefits through raises and promotion, to which he otherwise would have been entitled, and that he feared the loss of his position as a police officer.

The amended complaint then averred that by such duress, plaintiff was finally induced to dismiss his Workmen's Compensation action, which he did on April 15, 1958. It was then averred that malice is the gist of this action and that had plaintiff been able to prosecute his Workmen's Compensation Claim he would have recovered the sum of \$7695.25 and it was for this sum plaintiff demanded judgment.

All of the acts alleged in plaintiff's amended complaint occurred prior to December 16, 1959, the date of the decision in *Molitor vs. Kaneland School District*, 18 Ill. 2d 11. Governmental immunity is a complete defense to this action against Defendant City and the suit was properly dismissed as to it under the law in effect prior to the *Molitor* case. (*Peters vs. Bellinger*, 19 Ill. 2d 367).

The only allegation against defendant, Ralph W. Snyder, City Manager, is that he was "in complete accord with the position taken by defendant, Schmieg, the Chief of Police". No overt act of any kind was charged against Snyder. In the absence of a charge of some affirmative act by him this conclusion of the pleader states no cause of action against this defendant and the motion to dismiss was properly sustained as to him.

An injured employee has a right to compensation, which is defeated if he cannot invoke the Compensation Act without fear of economic losses incident to a discharge. It is inconsistent with the principles of compensation acts for an employer to force an employee to elect between compensation and continued employment. (Blumrosen, The Right to seek Workmen's Compensation, Rutgers Law Review, Vol. XV, No. 3 Page 493). The allegations of this amended complaint, however, fall far short of charging Schmieg, the Chief of Police, with forcing plaintiff to elect between compensation and continued employment.

The statements alleged to have been made by Chief of Police, Schmieg, did not compel plaintiff to make any election. This record fails to show any authority in the Chief of Police of Defendant, City, to make any promotions in the police department, or to grant or refuse pay or salary increases. The Chief of Police was not in a position to carry out the threats allegedly made by him. Under the Civil Service provisions of the Illinois Municipal Code (Ill. Rev. Stat. 1961, Chap. 24, Art. 10, Div.1, Sec. 18) it is provided that an employee may be removed, discharged or suspended only for cause and upon written charges and after an opportunity to be heard in his own defense. Pursuing one's legal right to file a claim under the Workmen's Compensation Law should not be considered a sufficient cause. Plaintiff was thus protected from a wrongful discharge from his job. Promotions are made by the Commission on the basis of merit. The Chief of Police may make reports to that body, but it can not be assumed that the Commission will act arbitrarily and capriciously by denying a promotion to plaintiff because he exercised an admitted legal right to file a compensation claim against the City.

Plaintiff's amended complaint does not state a cause of action and the trial court, therefore, properly dismissed it. The judgment of the Circuit Court of Lake County, will, therefore, be affirmed.

McNEAL, J. CONCURS.
SMITH, J. CONCURS.

Judgment affirmed.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION

May Term, 1962

38 I.A.² 197

IN THE MATTER OF THE ESTATE OF
ALVIN MORING, DECEASED.

PAUL MORING, Executor of the Last
Will and Testament of ALVIN MORING,
Deceased,
Plaintiff-Appellee,

vs.

PAUL MORING, individually, WAYNE
L. MORING, DONNA MORING, STATE BANK
OF FREEPORT, as Trustee, METROPOLITAN
LIFE INSURANCE CO., a Corporation,
B.H. UNANGST, Trustee, FANNIE MORING,
EVELYN BUFFINGTON, MARION GREENFIELD,
VERLYN MORING,
Defendants-Appellees,
and
IVA MANUS,
Defendant-Appellant.

Appeal from the
County Court of
Carroll County.

DOVE, P.J.

Alvin Moring, died testate on July 30, 1959. He was survived by his widow, Fannie Moring and by Paul S. Moring, Wayne L. Moring and Verlyn Moring his sons and Donna Moring, his daughter. His will was duly admitted to probate and Paul Moring was appointed Executor.

Article I of his will directed his executor to pay out of income or principal of his residuary estate all debts, funeral expenses, costs of administration and all estate,

inheritance, transfer and succession taxes. By Article II he bequeathed to his wife the household furniture, automobiles, jewelry, wearing apparel and other described articles.

Article III of the Will provided,

"A. If my wife, FANNIE MORING is living sixty (60) days after the date of my death, I give, devise and bequeath to my said wife, the use and income of all of the rest, residue and remainder of my property, of whatever kind or nature, and wheresoever situated, for and during her natural life, the income thereof to be paid to her at least annually, the remainder to my children then living, share and share alike, except DONNA MORING, for whom I have made other provisions in this Will. It is my further wish that my then living sons shall have the right to purchase the farm forming part of my estate, and upon which he is then living. For that purpose, my Executor is hereby ordered and directed to offer such farms to my sons in the following manner and for the following purchase price.

(a) To my son, PAUL S. MORING, he shall offer to sell the farm occupied by him for the sum of \$400.00 per acre.

(b) To my son, WAYNE L. MORING, he shall offer to sell the farm occupied by him for the sum of \$350.00 per acre.

(c) To my son, VERLYN E. MORING, he shall offer to sell the farm occupied by him for the sum of \$275.00 per acre.

Each of my said sons shall then have the right to buy said farm upon which he is living at the value above mentioned at any time within six (6) months after the date of the death of my said wife. The intention so to purchase must be evidenced in writing directed and delivered to my Executor within said six (6) months period. Any farm not so purchased by a son of mine may be disposed of by my Executor in such manner as he may deem for the best interests of my estate.

Even though my son, PAUL S. MORING, is hereinafter named as Executor of this my Last Will and Testament, he shall have the right and power to convey to himself if he elects to purchase the farm occupied by him as is herein provided."

In addition to the personal property bequeathed to his wife, the estate of the testator consisted principally of three farms in Ogle County and a residence in Shannon, Illinois. The residence property was occupied by the testator, his wife and daughter at the time of his death. One of the farms consisted of

160 acres and was occupied by Verlyn Moring. Another farm consisted of 161.16 acres and was occupied by Wayne Moring and the other parcel of land consisting of 168.5 acres was occupied by Paul Moring.

In October 20, 1960 the executor filed in the County Court, a verified statement of the condition of decedent's estate and thereafter, on October 25, 1960, he filed his petition in the County Court of Carroll County in which he alleged, among other things, that the net deficiency of the personal estate to pay the claims and estimated expenses of administration is \$51,475.99; that testator left four parcels of real estate, one of which was a farm of 160 acres, which, under the provisions of testator's will, Verlyn Moring had an option to purchase at \$275.00 per acre; that this farm is subject to a trust deed securing the payment of a note in the principal sum of \$20,000.00; that another farm of the testator's consisted of 161.16 acres, subject to a mortgage in the principal sum of \$26,200.00; that Wayne Moring had an option, under testator's will to purchase this farm for the sum of \$350.00 an acre; that the third farm consisted of 168.5 acres which testator's son Paul Moring had an option to purchase at \$400.00 per acre. The petition also referred to the residence property in Shannon which was occupied by the widow and daughter of decedent as their homestead. The petition prayed for an order directing petitioner, as Executor to sell all or so much of the described real estate, as shall appear to be necessary to pay the debts of decedent.

The several defendants answered the petition and a hearing was had resulting in a decree finding that the personal estate of decedent was insufficient to pay the claims against the estate and the costs of administration and finding that the amount

of such deficiency was \$51,475.99. The decree further found that Fannie Moring, the widow had, by proper instrument in writing, filed her renunciation of the will and that she was therefore entitled to an outright one-third (1/3) interest in all of the real estate of decedent after the payment of all just claims and mortgages.

The decree found that the several sons of the testator had a right to purchase the farms at the option prices set forth in testator's will and directed the executor to sell the several farms to said sons at the option prices and directed that the purchasers should pay 10% of the purchase price within ten days after the signing of the decree and that the balance should be paid on or before March 1, 1962. On October 20, 1961, Iva Manus a defendant filed her motion to vacate this decree. This motion was heard and denied and this defendant, a legatee and devisee, appeals.

It is insisted by counsel for appellant that this decree is void for three reasons, (a) because there was a power of sale in the will; (b) because the court did not have jurisdiction of all necessary parties at the time the decree was rendered, and (c) because there is no statutory provisions authorizing a sale free and clear of a mortgage not due.

The record shows that within a week after the decree was rendered, each son exercised, in writing, his option to purchase the farm he occupied and paid to the executor 10% of the purchase price as the decree provided. The instruments exercising the options were accepted by the executor and his acceptance noted thereon and they were filed in the County Court on September 29, 1961. Counsel for appellant state that the validity of the several options is not an issue on this appeal.

In support of her contention that where the will grants a power of sale to the executor, the County Court is without jurisdiction to decree a sale of real estate upon the petition of the executor, appellant cites 34 C.J.S. Executors and Administrators, sec. 545, p. 484, and also some of the cases there cited, Snow vs. Bray, (Ala.) 73 So. 542; Wilson vs. Holt 83 Ala. 528, 3 So. 321, 3 Am. St. R. 768; In re Syrcher's Est. 299 N.Y.S. 267, 164 Misc. 102.

The text in 34 C.J.S. states that, as a general rule, the court should not order a sale of property when there is a power of sale in the will under which the representative may act, but circumstances may arise under which a sale by order of court may be proper notwithstanding the will confers such a power. In a foot note it is said that notwithstanding a surviving executor had power, under the will, to make a sale of property, he had the right to go into a court of equity for advice and instruction as to a sale, and, having taken that course, in good faith, he was protected, in making the sale, by the order of the court directing the sale, citing Shepherd vs. Darling, 120 Va. 586, 91 S.E. 737, 739.

Probate courts are not courts of general chancery jurisdiction but they do possess such chancery powers as are conferred upon them by statute. They do have jurisdiction to administer the estate of deceased persons and under its equitable powers it construes wills and determines the rights of legatees thereunder. (Kerner vs. Peterson, 368 Ill. 59, 76, 77). A gift by a testator to his children of an option to purchase land at a certain price is valid and upon the election by the children to exercise the option they are entitled to the land under the terms of the will. (Daly vs. Daly, 299 Ill. 268, 274, 275.)

The testator's will created a life estate in his surviving spouse, Fannie Moring, and the remainder to certain defendants. He also gave each of his sons an option to purchase a described tract of land at a definite price. The surviving spouse filed her renunciation resulting in the acceleration of the remainder. (Elliott vs. Brintlinger, 376 Ill. 147, 150).

Our Probate Act provides that when there is insufficient personal estate to pay expenses of administration and claims against the estate, the executor may file a petition in the court which issued the letters of administration, to sell so much of testator's real estate as maybe required to realize sufficient funds to pay the expenses of administration and claims against the estate. (Ill. Rev. St. 1961, Chap. 3, Art. XIX, sect's. 225, et seq). Section 234 of the same act enumerates the powers of the court in such a proceeding and Section 246 is to the effect that the provisions of this article do not apply to sales made without order of court by an executor under a power given in the will.

The record discloses that the 160 acre farm owned by the testator and which he gave his son, Verlyn Moring the option to purchase at \$275.00 per acre was subject to a trust deed securing the payment of \$20,000.00 and that the tract which testator gave his son, Wayne Moring the option to purchase at \$350.00 per acre, was subject to a mortgage to the Metropolitan Life Insurance Company upon which there was an unpaid balance of \$26,200.00. The decree granted the executor leave to sell these three farms, recognized the validity of the options provided in testator's will and directed the executor to sell the several tracts to the sons of

the testator as in the will provided. The record also shows that each son exercised his option and has paid the executor the sum directed by the decree.

There is no merit in any of the contentions of appellant. Simply because testator provided options to his sons to purchase this land and a power to his executor to sell in accordance therewith did not preclude the court in which the administration of this estate was being carried on, from entertaining this petition or deprive it of jurisdiction. The statute gave it jurisdiction of the subject matter and it had acquired jurisdiction of all interested parties and the only defendant not satisfied with the decree is appellant, a legatee and devisee.

The decree did grant leave to the executor to sell one of the farms "free of mortgage of the Metropolitan Life Insurance Company in the sum of \$25,300.00 plus accrued interest and prepayment penalties provided under the terms of said mortgage". Counsel insist that this mortgage was not due and therefore the court had no authority to decree the sale free and clear of this mortgage because the record does not show any assent by the mortgagee to such sale. The record shows that the appearance of the Metropolitan Life Insurance Company was entered herein by its counsel and it filed an answer, and has taken no appeal from the decree and has made no appearance or filed any brief in this court. It is the only party affected by this alleged error and it is not complaining. It is not contended that the finding of the amount due under this mortgage is not correct.

It is also insisted by appellant that defendants, Fannie Moring, Marion Greenfield and Evelyn Buffington, were not served with process. The record discloses, however, that each of these



defendants entered their respective appearances herein by an instrument dated October 26, 1961 and filed with the Clerk on November 13, 1961. This entry of appearances recited that they were under no legal disability; that they consented to the entry of an order by the court granting the executor the relief he prayed for in his petition and consenting to and affirming all action theretofore taken by the court and ^{to the provisions of} consenting/the decree theretofore entered by the court. In Lord vs. Hubert, 12 Ill. 2d 83, 87 it is said that a defendant though not named as a party in the original action, may subsequently appear, even after judgment, and become bound by the foregoing proceedings, just as effectively as if he had been initially served.

It is apparent that as a result of the sons exercising their options, sufficient moneys will come into the hands of the executor to pay the costs of administration and discharge all claims and debts of decedent. We find no error in this record which would justify the reversal of this decree.

The decree of the County Court of Carroll County is affirmed.

Decree affirmed.

SMITH, J. Concurs

McNEAL, J. Concurs

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
OCTOBER TERM, A. D. 1962

38 I.A.² 198

CLIFTON D. WEISS,

Plaintiff-Appellee,

vs.

SEARS, ROEBUCK & CO.,
a Foreign Corporation,

Defendant-Appellant.

Appeal from the

City Court of

Elgin, Illinois.

CROW, J.

This is an appeal by the defendant, Sears, Roebuck & Co., a foreign corporation, from a judgment for the plaintiff, Clifton D. Weiss, entered on a jury verdict, in the amount of \$5,200.00, for injuries received on a stairway provided by the defendant in one of its stores for the use of its customers. Briefly, the complaint alleged that the defendant on January 8, 1959, negligently caused or permitted certain steps in one of its stores in Elgin to become and remain in a dangerous and unsafe condition by reason of water and melting snow thereon, which facts were known to the defendant, and that the plaintiff, while a patron of the store and using the stairs in the exercise of due care and caution, as a result of the negligence of the defendant, slipped, fell, and was injured. Briefly, the answer denied any negligence and denied the plaintiff fell and was injured as a proximate result of any negligence of the defendant. The Court denied motions by the defendant for a directed verdict at the close of the plaintiff's evidence and at the close of all the evidence. The Court denied the defendant's post trial motion for judgment notwithstanding the verdict or for new trial.

The defendant's theory is that the plaintiff failed to make a prima facie case and the Trial Court should have directed a verdict in its favor, or, in the alternative, that the Court erred in the admission of certain prejudicial evidence for the plaintiff and should have granted the defendant a new trial, and that the verdict is contrary to the manifest weight of the evidence.

The plaintiff's theory is he was a business invitee, the defendant controlled and maintained the stairway, there was on the landing and stairs concerned a large accumulation of water, snow, dirt, and mud, the condition had existed long enough for the defendant to have notice, the defendant was negligent in not properly maintaining the area and in allowing the condition to exist, its negligence and the plaintiff's exercise of ordinary care were questions of fact for the jury, and no error occurred warranting a new trial.

It appears from the evidence that on January 8, 1959, between about 4:30 and 5:00 p.m., the plaintiff entered the store of the defendant in the City of Elgin, Illinois. There was water, slush, and snow on the ground throughout the City that day. There was water and snow outside the defendant's premises. A witness for the plaintiff, Mr. Dougherty, a postal carrier, also entered the store at approximately the same time. Together they entered a first set of doors, and then walked three feet to a second set of doors and on to a landing roughly 6' x 8' in size. The landing and stairs leading to the basement level were constructed with a rubber tile surface, and the removable corrugated rubber mat that the defendant possessed for use on the landing area was not on the landing at this time, although there is some evidence it was there on that day. While descending the stairway immediately past the landing,

some nine to twelve feet inside the store, at about the second or third step, and while holding on to the hand rail with his right hand, the plaintiff slipped and fell, injuring the thumb on his left hand. Water and moisture had been tracked into the entranceway and down the stairs. The landing had puddles of water on it, or almost puddles, and water, snow, dirt, and mud had been tracked down the stairs. Mr. Dougherty described the condition as more than just a little water, - more than just had been tracked in. The plaintiff had noticed water and moisture on the floor of the entranceway when he entered the store and he observed moisture and puddles of water on the stairs that had been tracked in. The defendant's employee O'Malley had spent the day cleaning and mopping the two main entranceways and the stairs leading therefrom, after he had cleaned the walks earlier in the morning, and there is some evidence he'd mopped this stairway at about 4:30 - 4:45 p.m., though some of the facts and circumstances indicate to the contrary. Mr. O'Malley himself said the entrance and steps concerned were "bad by reason of slush and water".

Mr. Dougherty, one of the plaintiff's witnesses, was permitted to testify over the defendant's objection that when he left the store twenty-five minutes after the accident he observed that the approach to the stairway, the stairway, and the landing were wet from snow, - wet snow, - more than fairly wet, - almost puddles of water.

In his brief the plaintiff states that he is well aware of the rule that a storekeeper is not an insurer of his customer's safety, but he urges that the proof shows there was a large accumulation of water, dirt and mud which was tracked in, and that it created a dangerous condition, of which condition the defendant was

aware, that the plaintiff was a business invitee, and, as such, the defendant owed him a duty of keeping the premises in a reasonably safe condition so that he would not be injured.

The defendant's post trial motion for judgment notwithstanding the verdict and its prior motions for directed verdict presented only a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences drawn therefrom, in its aspect most favorable to the plaintiff, there is evidence tending to prove any cause of action stated in the complaint, - if there is, the motions should be denied, and the weight and credit to be attached to it in connection with the other facts and circumstances shown are questions for the jury: TODD v. S. S. KRESGE CO. (1944) 384 Ill. 524; SCHRAGE v. ALLIED PAPER CORP. (1962) 34 Ill. App. (2) 9; Cf. JOHNSON V. SKAU (1962) 33 Ill. App. (2) 280; GERAGHTY v. BURR OAK LANES, INC. (1955) 5 Ill. (2) 153.

A proprietor owes a business invitee the duty of exercising ordinary care in maintaining the premises in a reasonably safe condition; liability will be imposed where a business invitee is injured proximately by slipping on a foreign substance on the premises if the proprietor knew of its presence, or if it was there a sufficient length of time that in the exercise of ordinary care its presence should have been discovered: DONOHU v. O'CONNELL'S, INC. (1958) 13 Ill. (2) 113. It was the duty of the defendant here to exercise reasonable care for the safety of the plaintiff, its business invitee, while he was on that portion of the premises required for the purpose of his visit; a proprietor violates his duty to such a business invitee when he negligently allows such conditions to exist on the property as imperil the safety of such an invitee upon the premises, and he may be liable for an injury proximately resulting therefrom provided the invitee was in the exercise of due

care: GERAGHTY v. BURR OAK LANES, INC. (1955) 5 Ill. (2) 153.

The defendant owed a duty to exercise due care in the conduct of its business and to guard against subjecting the plaintiff to danger of which it was cognizant or which might reasonably have been anticipated: FITZSIMONS v. NATIONAL TEA CO. et al. (1961) 29 Ill. App. (2) 306.

MURRAY v. THE BEDELL CO. (1930) 256 Ill. App. 247, and CLARK et al. v. CARSON PIRIE SCOTT AND CO. (1950) 340 Ill. App. 260 referred to by the defendant on this are, we believe, distinguishable on the facts. BRUNET v. S. S. KRESGE CO. (1940) 115 F (2) 713, C.C.A. 7th, also cited, is more closely akin to the present case on the facts, but the Court there held and emphasized, as a part of its ratio decidendi, that, beyond the matter of the defendant's negligence, there was in that case no freedom from contributory negligence by the plaintiff, whereas here the defendant does not urge in its briefs that this plaintiff was guilty of contributory negligence, as a matter of law, its contention being that the defendant was not, as a matter of law, negligent.

We think it is somewhat of an oversimplification to say, as the defendant urges, that the evidence, viewed in its most favorable light for the plaintiff, tended to prove but a single fact, namely, that there was water and moisture on the steps and that such is insufficient to establish negligence. We believe that, under all the circumstances, viewing the evidence as it must be viewed on a motion to direct a verdict or for judgment notwithstanding the verdict, and considering the issue as it is presented to us, it was a jury question whether the defendant's employee gave the stairway such reasonable attention by mopping, or otherwise, as would keep the

stairs in a reasonably safe condition or whether the defendant was otherwise negligent towards the plaintiff business invitee in maintaining the stairway in a reasonably safe condition.

Nor do we believe the verdict is contrary to the manifest weight of the evidence. The issue of negligence is ordinarily and preeminently a question of fact for a jury to decide. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact finding body. We are not free to reweigh the evidence and set aside the verdict merely because the jury could have drawn a different inference or conclusion. WEIL v. GOLDBLATT BROS., INC. (1945) 325 Ill. App. 579, referred to by the defendant is an abstract decision and it cannot be said from the syllabus that it is wholly analogous or controlling. BUCYNA v. RIZZO BROS. MOVERS, INC., et al. (1961) 31 Ill. App. (2) 31, also cited by the defendant, deals, so far as applicable, with a point of evidence as to which there is no real controversy and reiterates simply that it is the jury's province to determine what weight, if any, is to be given to the evidence of a witness under Section 60 of the Civil Practice Act.

As we previously said, the plaintiff was permitted, however, to prove by his witness Dougherty, over the defendant's objections, that when Dougherty left the store some twenty-five minutes after the accident, he observed water and moisture on the approach to the stairway, the steps, and landing at the top of the stairs, - they were wet from snow, - wet snow, - more than fairly wet, - almost puddles of water. This testimony did not tend to prove the plaintiff's cause of action. The same witness and the plaintiff himself had testified as to the condition of the stairs and entranceway at the time the plaintiff fell. In the absence of testimony that the same condition Dougherty testified to as existing 25 minutes after the accident existed at the time of and continued to prevail after the oc-

currence, and there is no such testimony, we believe this proof was prejudicial to the defendant. Additional moisture, water, or other foreign substance may possibly have been tracked in and been present after the accident, which would not, under the circumstances, of course, be proof of the condition and state of facts as to the stairway and landing before and at the time of the accident. Evidence so separated in point of time is not admissible if a condition is transitory or variable or impermanent. The condition here comes within the category of transitory or variable or impermanent. Evidence must relate closely enough in point of time to the time of the accident to make it apparent that the condition has not been changed, or it must appear that the situation is so consistent or constant or permanent that lapse of time will not make a material difference, which is not the present case: 20 AM. JUR. p. 284 - 286; 80 A.L.R. p. 446-449. The admissibility or non-admissibility of evidence of the type offered depends almost entirely on the nature of the specific thing or condition whose existence is in issue and the particular circumstances affecting it in the case at hand: WIGMORE on EVIDENCE, 3rd Ed., Vol. II, p. 413. CHICAGO, P. and ST. L. RY. CO. v. LEWIS (1893) 145 Ill. 67, referred to by the plaintiff involved an entirely different type of thing or condition than what is concerned here, and the complaining party did not properly preserve his objections in the record. DEVINE v. CARLSON (1917) 207 Ill. App. 415, also referred to by the plaintiff, is an abstract decision, but so far as can be perceived it also involved an entirely different type of thing or condition than what is concerned here.

There was reversible error in the admission of the indicated testimony. For that reason the judgment is reversed and cause remanded for a new trial.

Wright, P. J. Concur
Spivey, J. Concur

REVERSED AND REMANDED.

STATE OF ILLINOIS

APPELLATE COURT

58 I.A. 229

AT AN APPELLATE COURT, for the ^{THIRD}~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Judge

HONORABLE WILLIAM M. CARROLL, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 26th day
of DECEMBER A. D. 19 62, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10404

Agenda No. 6.

Ridgeway R. Orr,

Plaintiff-Appellee,

-vs-

Appeal from the
Circuit Court of
Vermilion County.

Ralph F. Norton, Administrator of
the Estate of Maurice A. Strickland,
Deceased,

Defendant-Appellant.

REYNOLDS, J.

This is a suit for personal injuries suffered by Ridgeway R. Orr, in a collision between an automobile driven by Maurice A. Strickland, deceased, and an automobile driven by one Ruth Edna Crist. The collision occurred near Cayuga, Indiana, where Indiana Route No. 234 crosses Indiana Route No. 63. Strickland was driving his automobile with Orr riding beside him in the front seat. The weather was clear, the pavement was dry, and the time was about mid-day. The highway was level at the point of intersection. Strickland was driving about 50 miles per hour



and there was nothing to obstruct his view of the intersection or a clear view of Route No. 63 to the north of the intersection. There was a red and white stop sign 41 feet west of the intersection, on the right or south side of Route No. 234. Strickland did not stop for the intersection, did not slacken speed, and drove into the intersection and was hit near the center of the intersection by the Crist automobile. Strickland was killed. Orr, who was a guest passenger in the Strickland automobile was injured. The cause was tried before a jury and the jury returned verdict for the plaintiff in the amount of \$12,000.00. Judgment was entered on the verdict and the defendant appeals to this court.

The injury to the plaintiff occurred in the State of Indiana and the rights and duties of the parties must be determined by the laws of that State which regulate their relation to each other. Christiansen v. Graver Tank Works, 223 Ill. 142; Mithen v. Jeffery, 259 Ill. 372; Ope v. Pryor, 294 Ill. 538; Butler v. Wittland, 18 Ill App. 2d 578; Cooper v. Cox, 31 Ill. App. 2d 51. Where the lex loci delicti creates



a cause of action conditioned upon the application of a particular standard of care, and such standard has been defined by judicial decisions on the place of the wrong, the standard of conduct as thus defined should be applied by the forum in which the action has been brought. Restatement, Conflict of Laws, Section 380 (2) (1934). Cooper v. Cox, 31 Ill. App. 2d 51. The law of the forum governs the procedure of the trial. Mithen v. Jeffery, 259 Ill. 372.

In Indiana, the owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from the injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle. Burns' Ind. Stats. Ann., ch. 10, Section 47-1021. Thus, liability of a motor vehicle owner, operator or person



responsible for the operation of such vehicle is narrowed by Indiana Statute to one who causes injuries to his guest passenger by wilful or wanton misconduct in his operation of the motor vehicle. Since the substantive law of Indiana must govern this cause, what constitutes wilful and wanton misconduct in Indiana is the test upon which this cause must be decided. In determining what is required in Indiana to establish wilful and wanton misconduct, it is necessary that we look to the decisions of the Indiana courts.

Wilful and wanton misconduct consists of the conscious and intentional doing of a wrongful act or omission of a duty, with reckless indifference to consequences, under circumstances which show that the doer has knowledge of existing conditions and that injury will probably result. Bedwell v. DeBolt, 221 Ind. 600, 50 N.E. 2d 875; Hoesel v. Cain, 222 Ind. 330, 53 N.E. 2d 165; Swinney v. Roler, 113 Ind. App. 367, 47 N.E. 2d 846; Becker v. Strater, 117 Ind. App. 504, 72 N.E. 2d 580; Brown v. Saucerman, 237 Ind. 598 (1957), 145 N.E. 2d 898.

Speed alone does not constitute wilful misconduct in



Indiana, yet there may be a point at which the speed became so excessive that the danger of injury to a guest was probable. The circumstances in each case must rule this point. Brown v. Saucerman, 145 N.E. 2d 898. In the Brown v. Saucerman case, the evidence was that it was dark and raining, the pavement was slick, the driver of the automobile was familiar with the highway and the car he was driving, that he had been cautioned he was driving too fast and had slowed to about 45 miles per hour and he was in his own traffic lane until he was blinded by the lights of a truck as it came around a curve and over the crest of a hill. The car skidded and plaintiff's intestate was killed in the resulting accident. The court in that case held that the speed did not appear to be so excessive that the danger of injury to the guest was of such probability as to constitute wanton or wilful misconduct. And the court, further said that to have been guilty of wanton or wilful misconduct the driver of the automobile must have intentionally proceeded into the curve with reckless indifference to the



consequences, knowing that a condition existed from which, because of his conduct, an injury to his guest would probably result. Citing Bedwell v. DeBolt, 221 Ind. 600, 50 N.E. 2d 875; Swinney v. Roler, 113 Ind. App. 367, 47 N.E. 2d 846; Becker v. Strater, 117 Ind. App. 504, 72 N.E. 2d 580. In order to sustain a verdict for the guest the burden was upon the guest to show more than a mere failure on the part of the driver to apprehend the danger of approaching the curve where the accident occurred, at an excessive rate of speed under the circumstances. Brown v. Saucerman, 237 Ind. 598 (1957), 145 N.E. 2d 898.

The burden is upon the guest to show by a preponderance of the evidence that the driver was conscious of his conduct, and with knowledge of existing conditions that injury would probably result, and with reckless indifference to consequences, he consciously and intentionally did some wrongful act or omitted some duty which produced the injuries. Wyatt v. Thompson, 175 N.E. 2d 44. (Ind. App. Ct. 1961).



In the case of Reynolds v. Langford, 241 Ind. 431, 172 N.E. 2d 867, Langford drove into an intersection without stopping, at a speed of 50 miles an hour, and was struck by a truck. There was a clear and unobstructed view of the intersection and the driver drove past a stop sign. The court held that it was unable to say that Langford consciously and with knowledge that the truck was approaching, intentionally and with reckless indifference to the consequences, drove into the intersection knowing that if he did so injury to his passenger would probably result. And the court in that case said that while the evidence there might sustain a charge of negligence, there was, however, a total absence of evidence or legitimate inference in favor of the plaintiff upon the issue of wilful or wanton misconduct.

In Swinney v. Roler, 113 Ind. App. 367, 47 N.E. 2d 846, the driver drove into the intersection without stopping, at a speed of 50 miles an hour. He saw a car approaching on the cross road, but believed it was slowing or stopping, and continued his speed until it was too late to avoid the collision. The driver of the other car did slow down and then



speeded up. The court held that the defendant made a mistake in judgment which might support a charge of negligence, but not one of wanton and wilful misconduct.

The case of Becker v. Strater, 117 Ind. App. 504, 72 N.E. 2d 580, also arose out of a collision at an intersection of two highways, one a preferential highway. In that case, the driver had reduced his speed from 35 to 15 miles per hour, but did not obey the stop sign. Neither the driver or the guest saw the approaching automobile on the intersecting highway. In that case the driver was familiar with the intersection and there was nothing to obstruct his view of the crossing. He saw some cattle near the crossing and called the guest's attention to the cattle. When in the intersection he was struck by a car on the intersecting highway. The court held that the driver was not warned by others, or his own senses. He had no knowledge of the approach of the automobile which struck him. And the court in that case said, that applying the definition of wilful or wanton misconduct as the conscious and intentional doing of a wrongful act or omission of a duty, with reckless indifference to consequences, under



circumstances which show that the doer had knowledge of existing conditions and that injury would probably result, it could not say that the defendant was guilty of wilful or wanton misconduct.

In each of the Indiana cases cited the significant point seems to be that the court held as a matter of law that there was insufficient proof to sustain the wilful and wanton charge. The courts in these cases seems to rely on the rule as stated in Bedwell v. DeBolt, 221 Ind. 600, 50 N.E. 2d 875, which laid down the rule that to hold one guilty of wilful or wanton conduct it must be shown that he was conscious of his conduct and with knowledge of existing conditions that injury would probably result and with reckless indifference to consequences, he consciously and intentionally did some wilful act or omitted some duty which produced the injury.

However, there is no all-inclusive rule in Indiana which can be adopted for every case construing wilful or wanton misconduct. The case of Miller v. Smith, 125 Ind. App. 293, 124 N.E. 2d 874, was a case where the driver drove into a railway crossing, and was struck by a train. The crossing was lighted,



there was a cross-arm plainly visible and a flagman was waving a red lantern. The driver drove around a stopped vehicle and drove in front of the train. And the court in that case, in passing on the question of wilful or wanton misconduct, said: "However, no all-inclusive rule can be adopted for application to every case. *Sheets v. Stalcup*, 1938, 105 Ind. App. 66, 13 N.E. 2d 346. 'Because of the difficulty of defining with precision the terms used in guest statutes to describe ***** misconduct for which the owner or operator is liable, in determining whether particular conduct falls within such terms each case must be decided on the circumstances peculiar to it; every act or omission entering into the particular happening must be considered and weighed in connection with all the other circumstances, and in arriving at such decision the consequences of one's conduct as well as the conduct itself may be determining factors, *****.' 60 C.J.S., Motor Vehicles #399 (4) f.p. 1007; *Sheets v. Stalcup*, supra; *Pierce v. Clemens*, 1943, 113 Ind. App. 65, 46 N.E. 2d 836. (Our emphasis)."

And the court in the same case, *Miller v. Smith*, cited above, at page 877, citing the case of *Bedwell v. DeBolt*, 221 Ind. 600,



50 N.E. 2d 878, said "acts such as exhibit a conscious indifference to consequences, make a case of constructive or legal wilfulness." (Our emphasis). The court, in said Bedwell case, also adopted as its own language a quotation from Blashfield, Cyc. of Automobile Law and Practice, Vol. 4, to the effect that the operator's knowledge of the probable result of his conduct may be 'express or implied.'". And the court, in the Miller v. Smith case, at page 877, continuing, said: "'The question as to whether the accident was caused by the wanton or wilful misconduct of the defendant should be left to the jury in all cases where there is any conflict in the evidence or where different inferences from the testimony given might be reasonably drawn.'"

The case of Rickner v. Haller, 124 Ind. App. 369 (1954) 116 N.E. 2d 525, involved a collision at an intersection. The court held that to hold a driver guilty of wilful or wanton misconduct under the guest statute, it is sufficient that the driver failed to stop before entering the intersection of the preferential highway, at which time the driver was conscious of the fact of the stop sign and that his conduct was in violation of the law and that, notwithstanding such knowledge, he proceeded to drive into



the intersection with conscious indifference to the likelihood of resulting injury to his guest.

In this case, there is evidence that the driver drove into the intersection, and into a preferential highway, at a speed of 50 miles per hour, without slacking speed; that there was a red and white stop sign some 41 feet west of the intersection. There was nothing to obscure the drivers vision, the weather was clear and the pavement dry. While the substantive law must govern this case as to what is wilful and wanton misconduct under the guest statute of Indiana, the procedural law must be the law of the forum. Under Illinois law, questions of fact are for the determination of the jury. The speed of the automobile, the failure to slacken speed, the existence of the stop sign, its position and size, the entering of a preferential highway, the failure to obey the stop sign, the weather conditions, the ability to observe approaching traffic on the highway being entered, all present facts from which the jury could draw inferences as to whether the driver was guilty of wilful and wanton misconduct under the guest statute of Indiana. Again, under Illinois law, the verdict of the jury will not be set aside by a reviewing



court unless clearly against the weight of the evidence. Here, the jury has found there was wilful and wanton misconduct on the part of the driver. On the record presented, this court cannot say the jury was in error.

As to the injection of "insurance" into the evidence, an examination of the record shows that it was by way of testimony of Dr. Brandenberger. There was no objection to the use of the word "insurance" at that time, the defendant objecting to other language in the answer. It would appear to this court that the use of the word "insurance" was inadvertent, and if there was any error, it was not reversible error. Pinkerton v. Oak Park Nat. Bank, 16 Ill. App. 2d 91; Seyferlich v. Maxwell, 28 Ill. App. 2d 469.

The defendant complains of Plaintiff's Instruction 3A, on the ground that certain allegations of the complaint, set out in the instruction, were not supported by the evidence. And the defendant contends there is no evidence to prove the defendant's decedent drove his automobile toward the intersection when a collision appeared to be imminent. The fact that there was a collision would appear to refute this contention. The other



points raised by defendant as to proof of wilful and wanton misconduct, all are questions of fact which the jury by its verdict said was proven.

Defendant also contends the giving of Plaintiff's Instructions Nos. 10 and 11 were reversible error, claiming the instructions omitted the element of "the conscious and intentional doing of a wrongful act or the omission of a duty". We see no merit in this contention. The instructions set out the Statutes of Indiana, as to the duty to stop where there was a stop sign and as to speed, but in each instance, the court instructed the jury that if the jury decided the deceased had violated the statute, the jury might consider that fact together with all the other facts and circumstances in evidence in determining whether or not the deceased was guilty of wilful or wanton conduct.

The judgment of the Circuit Court will be affirmed.

Affirmed.

CARROLL and ROETH, JJ., concur.

STATE OF ILLINOIS

APPELLATE COURT

31 I.A. 279

AT AN APPELLATE COURT, for the ^{THIRD}~~Fourth~~ Judicial District of the

State of Illinois, sitting at Springfield:

PRESENT

HONORABLE C. ROSS REYNOLDS, Presiding Judge

HONORABLE WILLIAM M. CARROLL, Judge

HONORABLE BURTON A. ROETH, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 22nd day
of OCTOBER A. D. 19 62, there was filed in the office of
the said Clerk of said Court an opinion of said Court, in words and
figures following:



11121

FILED

OCT 22 1962

Robert L. Conn, CLERK
APPELLATE COURT 3rd DIST.STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10395

Agenda No. 3.

Marie B. Hanley,)
)
Plaintiff-Appellant,)
)
-vs-)
)
Edward V. Hanley,)
)
Defendant-Appellee.)

Appeal from the
Circuit Court of
McLean County

REYNOLDS, P.J.

Marie B. Hanley, plaintiff, brought suit in the Circuit Court of McLean County against her husband, Edward V. Hanley, for possession of an 80 acre farm occupied by the defendant, and for an accounting. The court held that the title of the farm was in the plaintiff and that she was entitled to possession, but re-referred the cause to a



master in chancery to take evidence relative to an accounting between the parties. The defendant Edward V. Hanley appealed to the Supreme Court and that court dismissed the appeal for the reason that there was no express finding by the trial court that there was no just reason for delaying the appeal until all the claims, rights or liabilities involved were adjudicated. Hanley v. Hanley, 13 Ill. 2d 209. The decree of the trial court was amended and the matter again came to the Supreme Court on appeal and the amended decree was sustained as to the title and right of possession and the cause was remanded to the trial court for an accounting between the parties. Hanley v. Hanley, 14 Ill. 2d 566. The accounting matter was heard before a special Master in Chancery and the Master found that the plaintiff should pay the defendant the sum of \$5,000.00 for money advanced by the defendant to pay off an existing mortgage on the 80 acre farm owned by the plaintiff; that the plaintiff should also pay the defendant interest at the rate of 5% per annum on the said sum of \$5,000.00 from



December 6, 1946, and that the plaintiff pay the defendant the sum of \$1,022.81 for landowner's costs for the crops raised on the farm for the years 1955 and 1956. The Master also divided certain chattel property and money in the hands of the receiver, but those matters are not urged in the appeal and will not be considered. Both parties objected to the Master's report, but the trial court sustained and confirmed the Master's report and entered a decree in conformity therewith. The plaintiff appeals to this court.

The 80 acre farm involved in this cause was originally 160 acres and owned by defendant's father. A mortgage of \$15,000.00 against it was foreclosed in 1935 and in 1936, the farm was purchased in the name of the plaintiff. Purchase money mortgages were executed by plaintiff and defendant in the total sum of \$16,000.00. In 1938 80 acres of the farm were sold for \$16,387.00 and the greater part of this money was used to pay on the mortgage indebtedness. The unpaid balance on the mortgage was increased to \$6,300.00 in 1940, and in 1946, the balance of \$5,000.00 was paid off.



Plaintiff testified she paid \$2,500.00 when the farm was purchased and defendant testified he also paid in \$2,500.00. Defendant also testified he paid the \$5,000.00 balance in 1946 from money he received from the sale of a piece of property he bought from his aunt, Mrs. Gould. Other than the said sums of \$2,500.00 paid at the time of the purchase, and the \$5,000.00 paid when the mortgage was fully paid, all other funds used to pay for the farm came either from the sale of the 80 acres, or from the crops raised on the farm.

Plaintiff and defendant lived on the farm from 1918, when they were married, until the early part of 1955 when they separated. During that time, the defendant farmed the land, handled all funds received from crops, purchased all equipment and other items needed on the farm. In addition to operating the farm, defendant bought and sold hogs. Funds received were put into a common account or fund and used by both for personal as well as family expenses. Taxes, improvements, machinery, equipment, insurance, repairs and mortgage payments



were all made from this fund. Both the plaintiff and the defendant could and did draw from this fund. Apparently very little records were kept as to the money received or how it was spent. No attempt was made to separate the money received as to source. No accounting was had or asked for as to the farm income from 1936, when title was vested in the plaintiff, until the disagreement in 1955. This mingling of funds, the lack of records and the conflicting testimony of the principal parties make it impossible to make any accurate computation of money received or how it was spent. The Master did make an accounting of the farm income and expenses for the crop years 1955 and 1956 on a landlord and tenant basis.

The disputed findings of the decree before this court are, (1) The plaintiff owed the defendant \$5,000.00, (2) The plaintiff owed the defendant interest on the said \$5,000.00 at the rate of 5% from December 6, 1946, and (3) The plaintiff owed the defendant the sum of \$1,022.81 as landowner's share of crop cost for the years 1955 and 1956.



As grounds for reversal, the plaintiff urges three points. First, that the credits claimed by the defendant and funds taken by defendant were from money not his property. The nine cases cited by plaintiff in support of this point state the law that a wife may own her separate property, and the fact that a husband lives with her on the property, and renders some services, does not change the right of the wife to the rents and profits of such property. One case, McCallister v. McCallister, 342 Ill. 231, concerns a question of title between the husband and wife, and is not applicable here. Four of the cases cited by plaintiff are authority for the rule that a wife is not liable for her husband's debts. Bongard v. Core, 82 Ill. 19; Hazelbaker v. Goodfellow, 64 Ill. 238; Garvin v. Gaebe, Admr. 72 Ill. 447; Bennett v. Stout, 98 Ill. 47. In those cases, one of them 90 years old, the question of the separate estate of a married woman was something new. The Married-Woman Act of 1861 had overturned the old common-law concept of the rights of a wife to property. Under the common law, the rights of a married woman became, by the marriage, in-



incorporated into, and consolidated with, that of the husband, who had the absolute right to all of her personal property in possession; to her choses in action reduced to possession during his life, and to the rents, issues and profits of her real estate. As has been facetiously said, under the common law, the wife and husband were one, and he was that one. The act of 1861 had changed all this and these cases were defining her rights under the new law.

Here, the question is not whether the wife had the right to the issues and profits of her separate property, but what if anything, was due her.

The second point urged by the plaintiff is that the rights of the plaintiff are not barred by limitation or laches. This court agrees with that contention. Until an accounting is had or a demand therefor made and refused, or a repudiation of the agency between a husband and wife, the Statute of Limitations does not begin to run. The People v. Lefens, 269 Ill. 472.

The third point urged by plaintiff is that the defendant does not come into court with clean hands and is not entitled



to equitable relief. The plaintiff has asked that the court ascertain and determine between her and the defendant what is due to each other. Webster's Dictionary defines an "account" as "a reckoning; computation. A record or reckoning of debit and credit." The plaintiff cannot ask the court to render and state an account between her and the defendant, and when that account is so rendered and stated, and it is found that the plaintiff is indebted to the defendant, urge that the account is in error on the ground that the defendant is not in court with clean hands. If the defendant had asked for the accounting and it was determined he was not in court with clean hands, that might defeat his right to an accounting, but in this case, the plaintiff is the moving party. This court sees no merit in this contention.

Because this is a matter of accounting, the contributions of each party become important. The plaintiff put in \$2,500.00 when the land was purchased in 1936. Defendant claims he put in \$2,500.00 but this is disputed. The defendant also claims he put in \$5,000.00 of his own money to satisfy a mortgage



against the land in 1946, and that this money came from the sale of the Gould home. The defendant was engaged in the business of buying and selling hogs, but it is not clear if any profit was realized in this business. All the rest of the money used for family purposes and for the two parties came from the operation of the farm and the sale of the 80 acre tract. Purchase money mortgages, money borrowed from relatives and all other expenditures were paid from these two sources. Until 1955 there was no claim for rent, no claim of profits, but the situation of a man and his wife, living together on a farm and sharing the income thereof. There was a joint account and each could and did draw on this account. Money was spent to buy an automobile for a daughter. Money was spent out of this account to purchase a furnace for the home. Farm machinery was purchased. Taxes, insurance and other items were paid from this fund. After living and sharing together this way, not only from 1936 to 1955, but from 1918 to 1936, the couple reached the parting of their ways in the early part of 1955. The wife was adjudged the owner of the



farm and entitled to possession of it. Then, and then only, she claimed an accounting for the years past. The case of Spalding v. Spalding, 361 Ill. 387, lays down rules which are applicable to this cause. That case was a divorce case and an accounting had been asked. The wife claimed to have advanced money for rent of apartments occupied by the couple, and for money of the wife used for living expenses. The court, at page 394, said: "Her reimbursement is claimed for expenditures made during the time the parties were living together in the marriage relation. While in that situation it is the duty of the husband to support and maintain his wife, yet such duty is not a debt within the legal acceptance of that term. If a husband uses his wife's property for the support of the family with her knowledge and consent, a gift of such property by the wife may be inferred in the absence of proof of a contrary agreement, (Duval v. Duval, 153 Ill. 49; Reed v. Reed, 135 id. 482;) and where a wife permits her husband to receive the income from her separate estate and use it for the family support the circumstances may justify the inference of a gift. (Wolkau v. Wolkau, 299



Ill. 176.) Payments made by the wife out of her own funds towards the liquidation of family expenses are not regarded as advancements to the husband nor as a debt owing from him to her." And the court in that case continuing, on page 395, said: "We are of the opinion that the weight of authority supports the principle that for payments voluntarily made by the wife for family expenses during the time the husband and wife are living together, in the absence of proof of a specific agreement for re-payment by the husband, the law does not create an indebtedness of the husband to the wife." And the court justified its ruling holding that "Public policy, ever interested in the maintenance of a harmonious marriage relation, prohibits a contrary rule."

This court believes that the rule laid down in the Spaulding case has particular application here, especially as to the rent of the farm property. The receipts from the farm operation were used for family expenses, and although the wife had owned the farm since 1936, the farm rental, if there was such a farm rental due the wife, may be presumed as a gift of the wife

to the husband. That is not true as to the payment of \$5,000.00. The defendant testified he sold the Gould property and paid off the mortgage on the farm at the wife's request and on her promise to deed him a joint tenant's interest in the farm. This testimony is supported by the evidence of the daughter. There was a specific promise to repay, not in money, but in an interest in the farm. No gift could be presumed.

The accounting made by the master involves not only computations, but questions of fact. The master heard the testimony, examined the exhibits, and made his report and findings to the court. The chancellor considered the evidence on exceptions taken thereto, and approved the findings of the master. In such a case, our courts have uniformly held that such findings will not be disturbed unless manifestly against the weight of the evidence. Allendorf v. Daily, 6 Ill. 2d 577; Rose v. Dolejs, 1 Ill. 2d 280; Ginther v. Duginger, 6 Ill. 2d 474; Cuneo Press Inc., The v. Warshawsky & Co. 24 Ill. App. 2d 163, Gostomske v. Sommerfield, 15 Ill. App. 2d 478. This court cannot say that the master's or the



court's findings were against the manifest weight of the evidence. As to the interest on the sum of \$5,000.00 advanced by the defendant in 1946, since the court was acting in chancery and endeavoring to do equity between the parties, it would be wrong to hold that the rental of the farm of the plaintiff must be presumed as a gift of the plaintiff, and hold that the defendant would not be presumed to have made a gift of the interest until the final separation. The rule of law applicable to the acts of the plaintiff would be applicable to the acts of the defendant. The parties lived together until February 27, 1955. Up to that time the plaintiff had not asserted any claim for rent and the defendant had not asserted any claim for interest. Any interest must be computed from February 27, 1955.

The decree will be affirmed in all matters except as to the finding and decree for interest due the defendant, which will be reversed and remanded with instructions to compute the interest at the rate of 5% from February 27, 1955.

Affirmed in part and reversed in part with instructions.

CARROLL and ROETH, JJ., concur.



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
OCTOBER TERM, A. D. 1962

38 I.A. 280

HAZEL FAIRALL,

Plaintiff-Appellant,

vs.

SISTERS OF THE THIRD ORDER OF ST. FRANCIS,
ST. MARY'S HOSPITAL, A CORPORATION,

Defendant-Appellee.

Appeal

from the Circuit

Court of LaSalle

County.

CROW, J.

The plaintiff, Hazel Fairall, brought suit against the defendant, Sisters of the Third Order of St. Francis, St. Mary's Hospital, a corporation, of Streator, the alleged operator of St. Mary's Hospital in that city, to recover for an alleged tort which allegedly occurred on May 1, 1957. There is no allegation in the complaint of any liability insurance coverage by the defendant. The complaint alleges, generally, the plaintiff's status as a paying patient, her due care, negligence of the defendant, proximate cause, injuries, and damages. The defendant filed a motion to dismiss and in support thereof filed an affidavit that the defendant was a non-profit organization, organized under the general not for profit corporation act, to operate hospitals etc. for charitable etc. purposes, that on and prior to the first day of May, 1957, it was a charitable and eleemosynary institution which had no funds or assets separate and apart from the assets and funds

that comprise the trust funds of the hospital and that were necessary to carry on the operation of St. Mary's Hospital, and that there was no policy of liability insurance to cover any claim or cause of action against it for liability based on the claim made by the plaintiff in this cause. The defendant's motion was filed under Sec. 48 of the Civil Practice Act, relating to involuntary dismissal based upon certain defects or defenses: CH. 110 ILL. REV. STATS., 1961, par. 48. The plaintiff filed a motion to strike the defendant's motion and the Trial Court denied the motion to strike the defendant's motion to dismiss, allowed the defendant's motion to dismiss, and entered a final judgment for the defendant.

One of the reasons set forth in the plaintiff's motion to strike the defendant's motion to dismiss and argued on this appeal is as follows: "That the defense of immunity from tort liability is not available under either the circumstances or the pleadings herein involved on behalf of the defendant in this cause."

It is the plaintiff's theory that the tort liability immunity doctrine as to charitable institutions and corporations has been abrogated by the greater weight of authority in other jurisdictions, and should now be abolished by the courts of the State of Illinois, commencing with the determination of this case, and that a similar tort liability immunity as to School Districts (and like governmental bodies) has already been abrogated in and by MOLITOR et al. v. KANELAND COMMUNITY UNIT DIST. NO. 302 (1959) 18 Ill. (2) 11. The plaintiff argues, in effect, that the MOLITOR case should be extended to charitable and eleemosynary institutions and corporations, and such extension should be made retroactive to a date other than that announced in the MOLITOR case.

It is the defendant's theory that the immunity of charitable and eleemosynary institutions and corporations from tort liability has been abolished in Illinois prospectively as to all cases arising after December 16, 1959 by the decision filed that date in the foregoing MOLITOR et al. v. KANELAND etc. case, which the defendant assumes to be analogous and applicable, but inasmuch as this present suit arises on a complaint alleging injuries occurring on May 1, 1957, the accident complained of having occurred prior to the MOLITOR decision, immunity still exists with reference to this defendant, this occurrence, and this suit.

The decisions of the Supreme Court have clearly established that, at least prior to December 16, 1959, the trust funds of charitable and eleemosynary institutions and corporations were and are immune from tort liability for the negligent acts of their employees where there was or is no liability insurance, - the doctrine of respondeat superior has no application, under those circumstances, to institutions of that type, - if such a liability were admitted their trust funds might be diverted from the purpose for which they were given, - the trustees could not divert funds by their direct act and such cannot be indirectly diverted by the negligent acts of the managers, agents, or employees of the trust, - an institution of this character is not to be hampered in the acquisition of funds from those wishing to assist in its charitable work by any doubt as to whether such will be applied as intended or diverted to an entirely different purpose of satisfying tort judgments against the donee: PARKS v. NORTHWESTERN UNIVERSITY (1905) 218 Ill. 381. The exemption from liability, however, is not absolute, - it may be waived, - the sole object of the doctrine is to protect the trust funds of such institutions from depletion through such means, - beyond that the rule of respondeat superior is in effect, - hence, if it appears

the trust funds of the institution will not be impaired or depleted by the complaint, because of the existence of liability insurance, it is error to dismiss the complaint: MOORE v. MOYLE et al. (1950) 405 Ill. 555.

In MOLITOR et al. v. KANELAND etc., supra, the Court held that a School District is liable in tort for the negligence of its employee, it is not immune from such tort liability, and overruled all prior decisions to the contrary, but the Court also held that except as to the plaintiff in that case the rule therein established should apply only prospectively to cases arising out of future occurrences and not retroactively. The opinion in that case was filed December 16, 1959.

In LIST v. O'CONNOR et al. (1960) 19 Ill. (2) 337 an action was brought against a Park District to recover for an alleged tort that occurred before December 16, 1959. The court held that the MOLITOR et al. decision applied, by analogy, to Park Districts, but that there was no liability in that case because the accident occurred before the date of the MOLITOR et al. decision, - the Court commenting that: "The abolition of the concept of governmental immunity found in the MOLITOR case, therefore, can have no application to the instant proceedings * * *".

Substantially the same result was reached in PETERS v. BELLINGER et al. (1960) 19 Ill. (2) 367 as to a tort claim against a City, the alleged tort having occurred July 20, 1956, - the Court there saying: "We do not reach the question of applicability of the MOLITOR holding to this case since the cause of action here arose on July 20, 1956, long before December 16, 1959, the effective date of the MOLITOR opinion, which struck down the doctrine of governmental immunity. Those municipal and quasi municipal corporations which have enjoyed immunity in the past continue to enjoy it until December 16, 1959 * * * ."

And LYNWOOD v. DECATUR PARK DISTRICT (1960) 26 Ill. App. (2) 431, and TERRY v. MT. ZION COMMUNITY UNIT SCHOOL DISTRICT NUMBER 3, etc. (1961) 30 Ill. App. (2) 307 are also similar cases in this particular respect.

It seems clear to us that if the MOLITOR et al. case, involving a school district, has equal application to a tort claim against the trust funds of charitable and eleemosynary institutions and corporations and has, in effect, abrogated the immunity of such from tort liability for the negligent acts of their employees where there is no liability insurance, such has been done prospectively only and from and after no earlier than December 16, 1959, not retroactively as of an earlier date. Hence, at least as of May 1, 1957, the alleged date of the alleged injury here, the law was and is that the trust funds of this type of defendant were immune from tort liability under the facts and circumstances indicated by these pleadings. We express no opinion as to whether the MOLITOR et al. case, by analogy, has abolished the immunity from tort liability of the trust funds of charitable and eleemosynary institutions and corporations, but, if it did, it did so no sooner than from and after December 16, 1959. Independent of the MOLITOR et al. case the last expression of the Supreme Court in the field as to charitable and eleemosynary institutions and corporations is MOORE v. MOYLE et al. (1950) 405 Ill. 555, where the Court specifically adhered to the doctrine of PARKS v. NORTHWESTERN UNIVERSITY, supra, on principle and authority, and declined to repudiate that doctrine, saying, in part, at p. 563:

"While there is a wide divergence of opinion as to the extent and basis for the doctrine elsewhere, it remains that the majority of American courts hold that the doctrine is sound in principle. It is pertinent to note, as appellees point out, that this court, in the PARKS CASE, considered whether the doctrine of exemption should be wholly rejected and, upon examination of the leading

case supporting such rejection, (GLAVIN v. RHODE ISLAND HOSPITAL, 12 R. I. 411,) expressly refused to follow it. In HOGAN v. CHICAGO LYING-IN HOSPITAL, 335 Ill. 42, that refusal was affirmed.

As to the contention that this court should wholly repudiate the holding in the PARKS CASE, it is apparent that the decision there is in harmony with the weight of authority in this country, was based upon adequate reasons of public policy and principles governing trust funds and has been firmly adopted in Illinois after full consideration of the contrary rule. No compelling reason is shown for abandonment of the rule now."

The Circuit Court, accordingly, correctly dismissed this suit and its judgment is affirmed.

A F F I R M E D .

Wright, P. J., and Spivey, J . , Concur

ABST.



48479

JOHN P. SPARKS,
Plaintiff-Respondent,
v.
THE PENNSYLVANIA RAILROAD
COMPANY, a corporation,
Defendant-Petitioner.

APPEAL FROM 3d. I.A.² 301
CIRCUIT COURT
COOK COUNTY

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This action was brought under the Federal Employers' Liability Act to recover damages allegedly sustained by the plaintiff while in the course of his employment as a brakeman for the Pennsylvania Railroad.

On May 9, 1959, the plaintiff was a member of a railroad train crew switching cars at the Velsicol Chemical Plant in Marshall, Illinois. He testified that while changing tail lights on the rear platform of the caboose he noticed that the engine rolling toward the caboose for the purpose of coupling it with the engine was, in his opinion, moving appreciably faster than the three or four miles per hour at which couplings are usually made. Fearing injury to himself as a result of the "rough coupling," plaintiff jumped from the platform of the caboose to the ground six feet below, thereby injuring his back. He testified that when the engine made contact with the caboose, the latter and the cars to which it was attached "moved eastward two to three feet." Plaintiff testified that after this alleged occurrence he returned to the caboose and continued working, "but noticed pain in the back around his fourth and fifth lumbar." Subsequently, the condition of plaintiff's back and the related condition of his left hip and leg have deteriorated to the point where he will

never be able to do laborious work again.

Plaintiff claims that his injuries were the direct result of the negligence of the defendant in that the engine being used on May 9, 1959 had defective brakes and that the defendant knew or should have known of this defective condition.

The defendant not only denied any negligence on its part, but also denied the occurrence of the alleged act. Therefore, the jury was left with three issues of fact to be resolved: (1) Was there such an occurrence? (2) Did it result in injuries to the plaintiff? (3) Was it the result of negligence on the part of the defendant? After hearing the evidence relating to these issues of fact the jury brought in a verdict of not guilty. On February 28, 1961, the trial judge entered the following order:

"Plaintiff's motion to vacate this court's order of February 28, denying plaintiff's motion for a new trial is hereby sustained, the court finding that it erred in refusing plaintiff's tendered instruction #13, and because of that error it is hereby ordered that plaintiff be granted a new trial."

It is from this order that the defendant-railroad appeals.

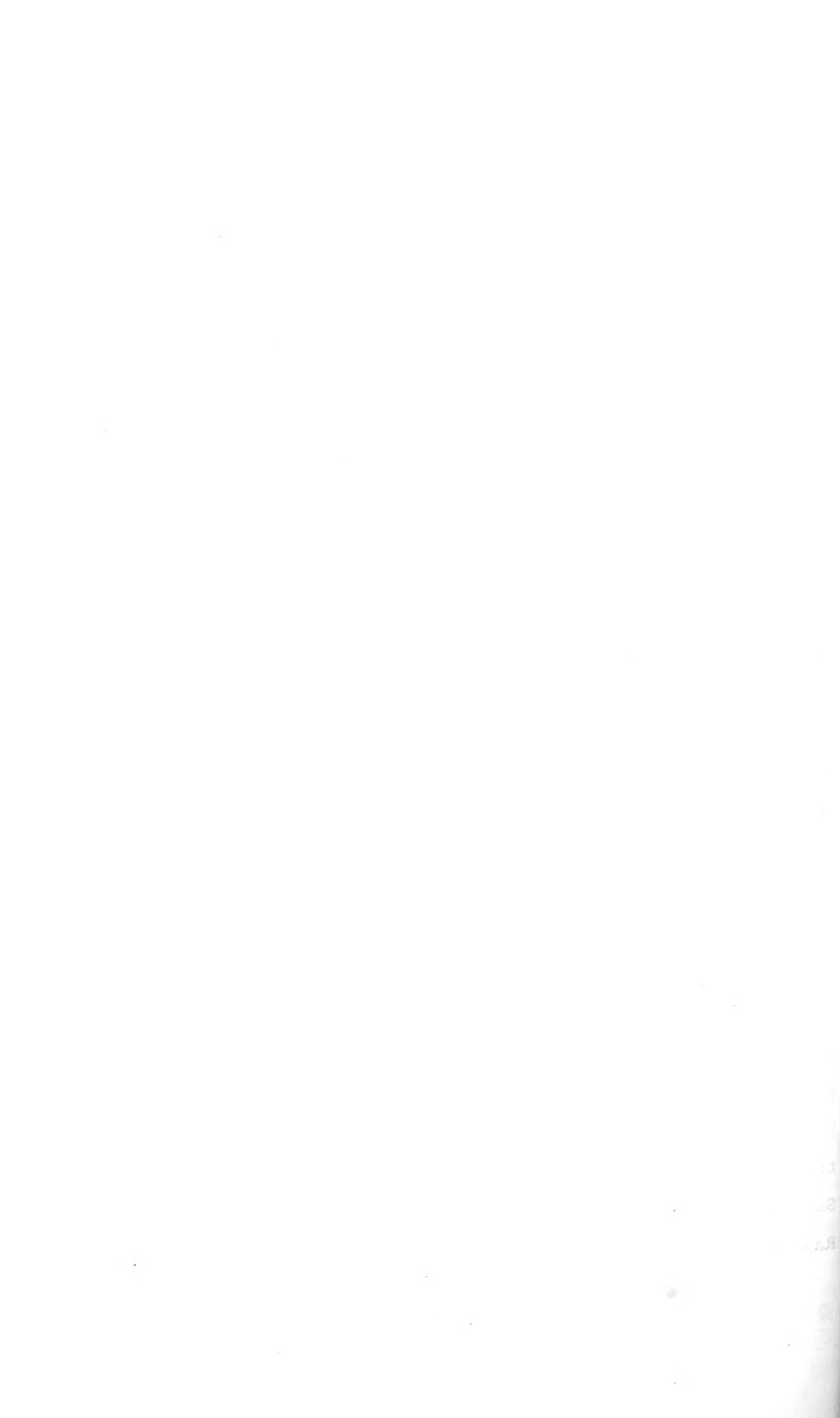
Instruction #13 which the trial court decided that it improperly refused was tendered by the plaintiff's attorney in the following language:

"The court instructs the jury that if you believe from the preponderance or greater weight of the evidence in this case that the defendant, The Pennsylvania Railroad Co., a corporation, negligently and carelessly permitted the brakes of the engine in question to become, and remain defective for a reasonable period of time prior to May 9, 1959, and if you further believe that the said engine was unsafe for the plaintiff to perform his usual duties of work at or near said engine for and on behalf of the said defendant, and if you further believe from a preponderance or greater weight of the evidence that the defendant, The Pennsylvania



Railroad Co., a corporation, knew or in the exercise of ordinary and reasonable care could have known of the existence of the defective condition of the brakes of the said engine, and if you further believe that the defective condition of the brakes of the said engine created a hazardous and unsafe place for the employees of the said Pennsylvania Railroad Co., a corporation, particularly the plaintiff herein, and if you further believe from a preponderance or greater weight of the evidence that the defendant permitted the brakes of the said engine to remain in a defective condition, thereby creating a hazardous and unsafe place for the defendant's employees, particularly the plaintiff herein, if from a preponderance or greater weight of the evidence you believe that such hazardous and unsafe place existed, and if you further believe by a preponderance or greater weight of the evidence that the existence of said defective brakes on said engine in question was the cause of the plaintiff's jumping from the said caboose, then you should find the defendant guilty."

It is the defendant's position that the trial court erred in granting the motion to vacate its previous order and in granting the plaintiff a new trial on the ground that the plaintiff's tendered instruction #13 should not have been refused. We agree wholeheartedly with the defendant in his criticism of the instruction. It was unnecessarily repetitious and tended to emphasize the plaintiff's charges of liability "by placing in the court's mouth substantially the entire charge of the complaint," *Signa v. Alluri*, 351 Ill. App. 11; *Walton v. Greenberg Mercantile Corp.*, 1 Ill. App.2d 99; *Roesler v. Liberty National Bank of Chicago*, 2 Ill. App.2d 54; *Warnes v. Champaign Seed Co.*, 5 Ill. App.2d 151; but perhaps the most objectionable feature of the proposed instruction was the fact that it was peremptory in nature but incomplete in substance in that it dealt with only one of the three major issues in the case. *Illinois Central Railroad Co. v. Smith*, 208 Ill. 608; *Krieger v. The Aurora, Elgin and Chicago Railroad Co.*, 242 Ill. 544; *Cromes v. Borders Coal Co.*, 246 Ill.



451; Bradley v. Vandalia R. R. Co., 207 Ill. App. 592; Ritson v. New York, C. & St. L. R. Co., 336 Ill. App. 356. See also Walton v. Greenberg Mercantile Corp., 1 Ill. App.2d 99.

This instruction was an abortive attempt to acquaint the jury with the issues involved. This practice of informing the jury as to the respective contentions of the parties has had a gradual evolution culminating in Signa v. Alluri, 351 Ill. App. 11. This evolution is set forth in Illinois Pattern Instructions No. 20.00. The present model for issue instructions is set forth in IPI, No. 20.01. That section provides, among other things, that issue instructions must meet the standards of Signa v. Alluri, supra., in that such instructions "shall be concisely stated without characterization and undue emphasis." Ill. Rev. Stat. 1959, ch. 110, § 101.25-1 provides that instructions should comply with the models contained within the IPI when such models are applicable, but in any event that the instruction should be "simple, brief, impartial and free from argument."

Proposed instruction #13 did not comply with IPI, No. 20.01 as read in connection with Signa v. Alluri, supra., and Ill. Rev. Stat. 1959, ch. 110, § 101.25-1 and was, by no stretch of the imagination, "simple, brief, impartial and free from argument."

The argument of the plaintiff in support of the trial court's order directing a new trial sounds in the proposition that the trial judge, by instructions and remarks, improperly influenced the jury and that, even though the trial court granted a new trial on other grounds, which this court may determine to have been improper grounds, the trial court's order should be sustained because of the actions of the trial court which improperly influenced the jury.

The plaintiff's brief sets out examples of interrogation of witnesses directly by the trial court and claims that the underlying tone of these questions and remarks of the trial court had a prejudicial effect. It is not improper for a trial judge to directly question witnesses and wide latitude is given a trial judge who finds it necessary to admonish witnesses to answer questions put to them. However, the trial court may not frame questions or comments in such way as to reflect a personal opinion either on the reliability of the witnesses or on the credibility of the evidence. *People v. Lurie*, 276 Ill. 630; *Schwab v. Chicago Consolidated Trac. Co.*, 155 Ill. App. 643; *Schaffner v. Masse*, 270 Ill. 207; *Kerkes v. Chicago Transit Authority*, 24 Ill. App.2d 187.

Whether or not and to what extent the court may participate in the examination of a witness depends on the facts and circumstances of each particular case and upon the conditions arising during the trial. *People v. Lurie*, 276 Ill. 630; *Kerkes v. Chicago Transit Authority*, 24 Ill. App.2d 187..

We do not feel from the facts and circumstances in this case that the trial court committed a breach of discretion in interrogating the witnesses.

Plaintiff's final contention is that the trial court erred in refusing to give plaintiff's instruction #12. We feel that there was no error in this refusal for the reason that this instruction was merely repetitious of what was expressed in plaintiff's instruction #11.

The order vacating the order denying the motion for a new trial and allowing a new trial is reversed and the cause is

-6-

remanded with directions to restore the order denying a new trial and for further proceedings in course.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS

FRIEND, J., and BURKE, J., concur.

ABST.



48623

JUDITH ANN PATTS,
Appellee,

v.

ROBERT J. ROGERS,
Appellant.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY

38 I.A. 2306

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Plaintiff brought suit to establish paternity of a child born out of wedlock and to enforce liability against defendant under the provisions of the Paternity Act (Ill. Rev. Stat. 1961, ch. 106 3/4, §§ 51-66). The case was dismissed with prejudice and defendant discharged on March 16, 1961. More than thirty days after the entry of this judgment, plaintiff filed a petition to vacate it. On April 21, 1961 the court allowed this petition. Thereafter, defendant appeared specially, in writing, on motion to vacate the order of April 21, 1961 reinstating the cause. The court denied the motion. Still later, again appearing specially, in writing, defendant filed a petition for rehearing on his motion and the order denying his request to vacate the order of April 21, 1961 reinstating the cause. The court denied his petition for rehearing and ordered the reinstatement order to stand. On August 10, 1961 defendant appealed "from those parts of the order . . . entered in said cause . . . reinstating plaintiff's cause, vacating the order of March 16, 1961, and denying defendant's motion to vacate the order of April 21, 1961."

Defendant denies that he is the putative father of the child. Before the complaint to establish paternity came on for hearing, the court on February 2, 1961, as a discovery measure, ordered that leave be given defendant to make photographs of

plaintiff's child on or before February 11, 1961. Subsequently, on February 23, 1961, plaintiff's attorney, Mr. LeSueur, had leave to withdraw from the case. Mr. Kearney, who was subsequently retained as plaintiff's attorney, was in court with her on that day. Thereafter, on March 1, 1961, defendant petitioned the court to strike the complaint and dismiss the cause because of plaintiff's continued refusal to comply with the February 2, 1961 order of court. Plaintiff was in court on March 1, 1961, when the court denied defendant's petition to dismiss the cause because of plaintiff's refusal to comply with the February 2, 1961 order, and gave plaintiff ten additional days in which to comply. Her appearance in court on March 1, 1961 was in response to notice sent to two addresses, 1535 West Forest Avenue, River Forest, Illinois, and 2531 North Fairfield Avenue, Chicago, Illinois, which she used interchangeably. The River Forest address had been given by plaintiff in a discovery deposition on January 12, 1961; the Chicago address was given to defendant's counsel by Mr. LeSueur on February 23, 1961. Plaintiff later testified that she had moved from the River Forest address in November or December of 1960; that she moved from the Fairfield address in Chicago on March 1, 1961; and that following her Fairfield move she left no change of address with the post office and notified neither defendant nor his counsel of her move. On March 16, 1961, notice having been sent to plaintiff at both the foregoing addresses, the court dismissed the cause with prejudice, and discharged defendant.

The record clearly shows that plaintiff's dilatory tactics were in defiance of the court's orders. She interposed no legal objections to the orders, but failed or refused to keep

photographic appointments arranged by counsel representing both parties; she did not have any pictures taken on her own initiative; she did not forward to defendant's counsel colored slides of the child, as she had promised to do. Defendant represented to the court that plaintiff's refusal to comply with these orders was prejudicial to him in the preparation of the case for trial; that on February 23, 1961 plaintiff appeared in court and threatened to have his counsel "bumped off" if they came near her home. As a result of these representations, the court allowed plaintiff ten additional days in which to comply with the order of February 2, 1961, and enjoined her "from threatening defendant's counsel, his partners or agents" with "any bodily harm."

The order of March 16, 1961 dismissing plaintiff's complaint reads as follows:

"This cause having come on to be heard upon the sworn petition of the defendant's attorney on March 1, 1961 to strike the plaintiff's complaint and dismiss the above cause with prejudice for plaintiff's failure to comply with the court's order of February 2, 1961 to permit the photographing of the plaintiff's illegitimate child and notice having been given and the plaintiff having been in open court and having requested the court for a ten (10) day extension within which to comply with the court's order of February 2, 1961, and further notice having been served upon the plaintiff of her failure to comply with the court's order of February 2, 1961 within the ten (10) day extension, and counsel for the defendant having appeared in open court and having heard arguments and the court finding that the plaintiff has wilfully and wantonly refused to comply with the court's order of February 2, 1961,

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff's complaint be and the same is hereby stricken upon good cause shown, the plaintiff's case be and the same is dismissed with prejudice and that the defendant, ROBERT J. ROGERS, be and is hereby discharged, and

"IT IS FURTHER ORDERED that the bond of \$1,000 heretofore deposited with the Clerk of this court be and the same is hereby released.

"IT IS FURTHER ORDERED that the trial date of April 13 [sic--should read 10], 1961 heretofore set be and the same is hereby struck, there being no cause before this Court."

This order effectively disposed of the proceeding, and after the lapse of thirty days the court had no jurisdiction to set it aside and grant plaintiff still further time within which to comply with the earlier orders of February 2, 1961 and February 23rd, to which she had interposed no legal objections but which she had persistently ignored.

Plaintiff has filed no brief on this appeal, but it appears from the abstract filed by defendant that her petition to vacate the order of March 16, 1961 may have been intended to constitute a prayer for relief under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1961, ch. 110). However, a careful examination of the abstract clearly discloses that plaintiff failed to comply with the provisions of section 72. Section 72 requires that notice be given to all parties to the petition. The record is barren of any notice having been given to defendant or his attorney of the proceedings of April 21, 1961 which sought to vacate the order of dismissal of March 16, 1961. No such notice of proof of service was filed with the court at any time prior to or after April 21, 1961, nor does any such notice appear of record. The affidavits of defendant's counsel state that he received no notice, that he knew nothing of the reinstatement until May 2, 1961, when he received a telephone call informing him of the new trial date. In *Hunt v. Bell*, 257 Ill. App. 432 (1930), the court held that plaintiff, invoking section 72, was compelled to give notice to defendant before he could obtain relief from a final order. It appears here that plaintiff wrongfully alleged either that defendant had been given notice or that an agreed order was being presented; neither allegation is supported by the record. For these reasons the court



could not assume jurisdiction to vacate the order of March 16, 1961 under section 72 of the statute.

Furthermore, a petition to vacate a judgment filed more than thirty days after the entry of the judgment should not be sustained unless the moving party supports his petition by affidavit or other appropriate showing as to matters not of record. Plaintiff and her attorney submitted to the court on April 21, 1961 only one paper, a notarized petition, signed by plaintiff and subscribed to by Donald Edwards, a notary public; there was no supporting affidavit, no notice or proof of service of the petition on defendant or his counsel. On June 19, 1961, two weeks after the date set by the court for plaintiff to file affidavits, a paper headed "AFFIDAVIT" was filed by plaintiff, but it carried no notarization. Neither plaintiff's petition of April 21, 1961, nor her subsequent reply and self-styled affidavit show any matter not appearing of record on March 16, 1961, which would justify setting aside and vacating the March 16, 1961 order. The Paternity Act specifically provides that provisions of the Civil Practice Act shall apply to the Paternity statute. The sole question presented is whether the court had jurisdiction to vacate the order of March 16, and the provisions of the Civil Practice Act govern as in all other cases.

The order vacating the final order of March 16, 1961, reinstating the cause, and denying defendant's motion to vacate the order of April 21, 1961, is reversed, and the cause is remanded with directions to reinstate the order of dismissal of March 16, 1961 as final.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P.J., concurs
BURKE, J. dissenting.



BURKE, J., dissenting:

The case was set for trial on April 10, 1961. Due to the fact that plaintiff had moved and that her attorney had withdrawn from the case, she did not have notice of the motion to be presented on March 16, 1961, resulting in an order on that day dismissing the case with prejudice and releasing defendant's bond. When she appeared for the trial of the paternity case on April 10, 1961, she was informed of the dismissal on March 16, 1961. In a reasonable time she requested the court to reinstate the case, which was done on April 21, 1961. On May 17, 1961, defendant moved to expunge the order reinstating the case. In an affidavit filed by plaintiff on June 19, 1961, she expressed a willingness to carry out the order entered February 2, 1961, to produce the child to be photographed. The court denied the motion to vacate the order of reinstatement.

The order reinstating the case should be affirmed under the liberal views expressed in *Ellman v. De Ruiter*, 412 Ill. 285, and subsequent cases. As the trial judge remarked, the welfare of the child and the interest of the state are also involved. Section 2 of the Paternity Act provides that the father of a child born out of wedlock whose paternity is established in a proceeding thereunder, shall be liable for its support, maintenance, education and welfare until the child's attainment of age eighteen, or until the child is legally adopted, to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support, maintenance, education and welfare. Under Section 3 a father whose paternity is so established shall also be liable for the reasonable expenses of the mother during the period of her pregnancy, confinement and recovery.

The position of defendant is that the reinstatement more than 30 days after the dismissal order was ineffective because

the court had no jurisdiction over the person of the defendant. Jurisdiction of the person may be obtained by service of process, appearance or estoppel. It is also well recognized that where jurisdiction of the person is lost, it may be restored by appearance or estoppel. When a party appears and participates in proceedings he is not in a position to assert that the court does not have jurisdiction. An examination of the report of proceedings of July 13, 1961, in the instant case shows a discussion between the court and counsel about the carrying out of the order to photograph the child. The attorney for defendant said the photographs which the attorney for the mother possessed were not satisfactory. At the time of the hearing the child was 10 months old. The judge indicated that he was denying the motion to vacate the order reinstating the case because he was "not going to penalize the child." He asked the parties to agree on the time when and place where the child would be photographed. The court said that the photographing of the baby would be without prejudice to any right the defendant would have to urge his jurisdictional question. Thereupon the attorney for defendant suggested that "without prejudice" the baby be photographed "on Monday at 2 o'clock." The court said "that will be the order" and that it would be without prejudice to defendant's contention that the court was without jurisdiction. It is obvious that the court could not order the photographing of the baby unless it had jurisdiction. Despite the protests of the defendant, he submitted to the jurisdiction. He cannot stand in an area of asserted jurisdiction and non-jurisdiction of his person. The case has not been tried. Should another petition be filed for the support, maintenance, education and welfare of the child, the defendant would undoubtedly assert

and endeavor to have the court hold that the dismissal with prejudice is res judicata.

Referring to the order procured by defendant for photographing the child, it is to be noted that in Robnett v. People, 16 Ill. App. 299, the court held that in an action of bastardy it is improper to introduce the child in evidence for the purpose of showing a resemblance between it and the defendant. In People v. Enke, 214 Ill. App. 244, the court in discussing the Robnett case said: "That case has never been cited either with approval or disapproval, and so far as we are able to find out it is not supported by any well-considered authority." It was not necessary to decide the point in the Enke case. In Benes v. People, 121 Ill. App. 103, it was held that allowing the mother of an illegitimate child to hold it in her lap while she was testifying in a paternity case is not error. In the Enke case the court concluded that it was not error to deny the motion to exclude the child from the courtroom during the trial.

In most of the pleadings, orders and petitions the defendant concedes that plaintiff is the mother of the child. In a petition in the later stages of the proceedings he infers that she could not give birth to a child. The Enke case states that for some purposes it might be competent that the child be produced in court and testimony offered of its identity, as in case it should be denied that a child had been born at all, or that it had since died. From a motion made by defendant it appears to be his position that the child should not be deliberately exhibited to the jury. The Robnett case supports defendant's position that it is improper to introduce the child in evidence for the purpose of showing a resemblance between it and the defendant. It is not clear what

motivates the defendant in his insistence on photographing the child or whether the court should require photographing. Defendant made no showing as to the need for photographing the baby. In this step he may be consenting to the showing of the child to the jury by plaintiff. *Morrison v. People*, 52 Ill. App. 482, 487. If defendant has a right to show a lack of resemblance to the putative father, the mother should have the right to show resemblance.

It will further be noted that under Section 11 of the Paternity Act upon the filing of a complaint the child shall be deemed a "dependent child" within the meaning of Section 1 of the Act therein described. The father of a natural born child or an adopted child is liable for its support, maintenance, education and welfare. Under Section 2 of the Act the father of a child born out of wedlock whose paternity is established by a proceeding under the Act has the same responsibility. It is doubtful that the mother can release or waive this right on behalf of the child as the defendant indicates was done in a release which he says he possesses. We do not infer that defendant is the father of the child. We think that for the protection of the rights of the baby and the mother and in accordance with the law, the order reinstating the case should be upheld and the issue of paternity decided in a trial. The facts presented authorized the reinstatement and section 72 of the Civil Practice Act.

ABST.



48717

SAM E. KOSTELNY,)
Appellee,,)
v.)
LOGAN HYDRAULICS, INC.,)
Appellant.)

APPEAL FROM

38 I.A. 326

MUNICIPAL COURT

OF CHICAGO

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

Plaintiff brought this action to recover commissions allegedly owed to him by the Logan Hydraulics, Inc., under a contract of employment entered into between the parties in January of 1957, which remained in effect until on or about April 14, 1960, at which time Kostelny left the employ of the company.

The defendant, Logan Hydraulics, Inc., is a wholly owned subsidiary of the Logan Engineering Company. The latter is purely a manufacturing company which designs and builds hydraulic presses and other precision machinery. Logan Hydraulics, Inc. is a sales organization selling only the products manufactured by the Logan Engineering Company. The plaintiff began working for the Logan Engineering Company in 1950 and remained with that firm until January of 1957 when he became the sales manager of the Logan Hydraulics, Inc., pursuant to an oral contract between himself and Melvin Lawrence, who was at that time, the general manager of the Logan Hydraulics, Inc. Under the terms of this contract plaintiff was to receive a base salary of \$8,400 per year plus a 1% commission on all "national" sales. In 1958, plaintiff's commissions totalled \$1,681.33; in 1959, his commissions totalled \$1,923.50 and in 1960, previous to the contracts in question, his commissions totalled \$441.91. Within a short time prior to leaving the employ of the defendant, plaintiff made the four sales from which his claim to

the commissions in question is derived. He claims that he is entitled to \$2,509.15 for sales made to the Western Electric Company, Vascoloy-Ramet Corp., John Royle & Sons Co. and The Singer Manufacturing Co. All four of these sales were made during the month of March, 1960.

On October 17, 1961, judgment was entered in favor of the plaintiff-appellee in the Municipal Court of Chicago after a trial without a jury, in the sum of \$1,612.50, of which \$112.50 represented interest, awarded pursuant to Ill. Rev. Stat. 1959, ch. 13, §13 - Attorneys and Counsellors.

For the purposes of this appeal, the defendant claims that Kostelny is not entitled to the commissions in question because it was incumbent upon him to do the "follow-up" work both at Logan Hydraulics and at the customers' plants. The defendant also claims that the payment to Kostelny of a commission on each individual sale was contingent upon Logan Hydraulics making a profit on that sale.

It is clear from the record of the trial court that Kostelny terminated his employment with the defendant corporation such a short time after he made the sales in question that the "follow-up" work which he actually did was negligible with respect to the entire picture and that the corporation lost approximately \$100,000 on these four contracts.

Since the trial court made findings of fact to the effect that it was necessary for Kostelny to do "follow-up" work before he was entitled to a commission, defendant claims that the judgment is contrary to the trial court's own findings.

Plaintiff claims that the oral contract entered into between himself and Mr. Lawrence, who was representing the company,

was clearly divisible into two parts, in that the \$8,400 was to be his compensation for the "follow-up" work and for his duties as sales manager and the 1% commission was to be his compensation for actual sales and was immediately due to him when he brought a sale into the office, regardless of whether or not the corporation subsequently made a profit on the contract.

He claims, therefore, that the decision of the trial court, should be reversed and remanded with instructions to enter a judgment for the entire \$2,509.15 but at the very least that this court should affirm the judgment.

He professes two primary arguments in support of his claim. The first of these is that "a party cannot shift his theory of the case in going from the lower court to the higher court." It is his contention that the defendant's theory of the case in the trial court was that the plaintiff was a disloyal and incompetent employee and that on appeal the defendant has maintained (1) that the 1% alleged to be owed him was a bonus and not a commission and (2) that the plaintiff was required to do additional work besides selling. Plaintiff claims that neither of these defenses was set up in the pleadings.

In support of his proposition that a party cannot shift his theory of the case in going from the lower court to the higher court he cites Dodd & Edmonds, Ill. Appellate Procedure, ch. 33, p. 51, which provides, as does 2 I.L.P., Appeal and Error, §182, in similar language, that: "A plaintiff must adhere to the trial theory of his cause of action . . . Where a theory is abandoned or withdrawn or not sustained by proof at the trial, it may not thereafter be urged . . . Theories of defense or offset cannot



be changed on review." He also cites *Levy v. Standard Elevator Co.*, 296 Ill. 295; *McArthur v. Whitney*, 202 Ill. 527 and *Continental Ill. Nat. Bank v. National Casket Co.*, 27 Ill. App.2d 447.

We agree with this principal whole-heartedly but feel that it is irrelevant to the case at bar. There has been nothing new urged on appeal which was not considered by the trial court. It is true, as plaintiff maintains, that the defendant asserted defenses late in the trial which differed from those immediately asserted. However, none of these defenses were inconsistent with the defendant's pleadings.

From the record of the trial court it is clear that the trial judge reached his findings after a lengthy consideration of the points urged by the defendants on appeal, i. e., that it was incumbent upon Kostelny to do the necessary follow-up work and for the company to make a profit on each individual contract as a condition for the payment of any commissions. Therefore, we fail to see that the defendant has shifted the theory of his case from that urged in the trial court to that now urged in the Appellate Court.

Plaintiff's other primary argument, which is also urged by the defendant, is that "The judgment and findings of a trial court who saw and heard the witnesses will not be disturbed unless manifestly against the weight of the evidence." We also agree whole-heartedly with this principal but fail to see how it helps the plaintiff's case. "The findings of the trial court in a case tried without a jury are binding on the Appellate Court, unless such findings are clearly and manifestly against the weight of the evidence. They are entitled to the same weight as the verdict of a jury, and, if there is substantial evidence to support the findings of the trial court such findings will not be disturbed even though,

on a review of the evidence, this court might be disposed to come to a contrary conclusion." Chamblin v. New York Life Ins. Co., 292 Ill. App. 532 and Vladoff v. Illinois Bankers Life Assurance Co., 320 Ill. App. 387. See also People ex rel White v. Underwood, 1 Ill.2d 620; Salzman v. Boeing, 311 Ill. App. 83 and Coleman v. Hait, 293 Ill. App. 615.

Neither of these parties is asking this court to reverse the trial court's findings of fact and to substitute its own findings of fact therefor. However, each party claims that the findings of fact made by the trial court were in his favor. After carefully searching the record, it is our opinion that the trial court made findings of fact in favor of the defendant. The following statements are from page 200 of the trial record:

"The court: I think I can find that your man . . . was not only to get the order but that he was to do what they referred to as follow-through.

Counsel for defendant: Follow-through work. That is right.

The court: He was to follow-through on it."

The court said at page 211:

"... and I think I can find that he was supposed to do some follow-up work or, we might say, from your point of view, not to complete the order but the getting of the order did not entitle him to the commission; he had to do other things. He had to follow through. Well, he left the company and they hired another man.

At page 219, the court said:

"I think I can find, . . ., that your man was to follow through on these which might mean more effort on his part than getting the sales. I appreciate that he could have done a lot of groundwork before this phone order came in."

It is uncontradicted from the testimony in the trial court that Kostelny did a negligible amount of follow-up work. In light of the findings by the court to the effect that the contract concerning Kostelny's compensation, i. e., \$8400 per annum plus 1%

of all national sales was a whole, indivisible contract and that it was necessary for Kostelny to do follow-up work in order to be entitled to a commission, we fail to see why or how the court arrived at the figure of \$1500 which was awarded to Kostelny.

It is apparent from the trial record that previous to the trial of the case the parties had attempted to effectuate a settlement and that the plaintiff had offered to take \$2000 and the defendant had offered to give \$700. Near the end of the trial the court urged the parties to use these figures as a basis for compromise and settlement. Neither party desired to make a settlement at that time and perhaps the judge, in awarding the \$1500, simply made it for them. Whatever his reasons we feel that he was in error in so doing. After hearing the facts and making a determination thereon, he should have found for the plaintiff in the sum of \$2,509.15 or for the defendant, but his action in making findings of fact in favor of the defendant and then awarding a judgment of \$1500 to the plaintiff was improper. His attempt to apply "fireside justice," which perhaps was founded on some quantum meruit theory, is not contemplated by the law. The court must take the contract as it finds it and may neither add new provisions nor delete provisions already there. Neither may a court revise a contract to arrive at a settlement which it deems equitable to the parties involved. The Chicago Title & Trust Co. v. Max Robin, 361 Ill. 261 and Englestein v. Mintz, 345 Ill. 48.

Judgment reversed and the cause remanded with instructions to enter judgment for the defendant and against the plaintiff.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.
BURKE, J., and FRIEND, J., concur.

ADST.



48720

MARIE PUM and LUDWIG PUM,

Plaintiffs-Appellees,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,

Defendant-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

38 I.A. 226

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

The defendant appeals from a judgment for \$200.00 entered because of a delay in transporting plaintiffs' baggage. Plaintiffs purchased tickets to travel from Chicago to New York City on defendant's railroad. On August 21, 1960, they became passengers on one of defendant's trains from Chicago to New York City. Prior to their departure they delivered three suit cases to the defendant for transportation to New York City and received three baggage checks. The train carrying plaintiffs arrived in New York City on the following day, August 22, 1960, at 6:05 P.M. They intended to leave for Germany via steamer from New York harbor at 11:00 P.M. that day. Their baggage had not arrived when it came time for them to board the steamer and they departed for Europe without their suit cases, which contained all their personal clothing and effects. The suit cases were plainly tagged and marked showing the time of departure of the ship.

Plaintiffs received their baggage on September 22, 1960 in Hamburg, Germany. On a claim being made by plaintiffs the defendant at first stated that there was only a brief delay in transporting the baggage to New York. Upon further investigation it was developed that it was necessary to remove the baggage car enroute because of a mechanical defect in that car. Because of mechanical failure the baggage car was put into a repair shop at



New Brunswick, New Jersey and the baggage therein, including plaintiffs' suit cases, forwarded by truck from that point to defendant's station in New York City, arriving there at 9:00 A.M. on August 25, 1960, There was less than a day's delay in transporting the baggage from Chicago to defendant's station in New York City. There was no proof as to when the bags arrived in Europe. There was no obligation on defendant to carry the suit cases beyond its New York depot.

The initial theory of liability, as disclosed in plaintiffs' original statement of claim, was that the defendant was guilty of negligence in handling their baggage. When their statement of claim was stricken they filed an amended statement of claim predicated liability on the theory that the defendant "intentionally, wilfully" and "with malicious disregard" mishandled their baggage. The allegation of wilful mishandling of the baggage was not proved; nor was there proof that the defendant was negligent in handling the baggage. The record does not show that there was an unreasonable delay in the transportation of the baggage from Chicago to defendant's depot in New York City.

For these reasons the judgment is reversed and the cause remanded with directions to enter judgment for the defendant and against the plaintiffs.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P.J., and FRIEND, J., concur.



ADCT

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48726

BLANCHE P. ESKIN and CHICAGO TITLE
AND TRUST COMPANY, as Trustee under
Trust No. 35942,

Third Party Plaintiffs
Third Party Counter Defendants,
Appellees,

v.

OSCAR and BERTHA FREEDMAN,

Third Party Defendants
Third Party Counter Plaintiffs,
Appellants.

38 I.A. 2327
APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal is dismissed for lack of an appealable order. Ill. Rev. Stat. 1959, ch. 110, § 50. See also Ariola v. Nigro, 13 Ill.2d 200; Getzelman v. Koehler, 14 Ill.2d 396; Biagi v. Gregory, 19 Ill. App. 2d 534.

Ill. Rev. Stat. 1959, ch. 110, § 50 (2) provides that "The court may enter a final order . . . as to one or more but fewer than all of the parties or claims only upon an express finding that there is no reason for delaying enforcement or appeal. . . ."

There was no such express finding in the case at bar and the only authority cited by the appellants, i. e., Village of Niles v. Szczesny, 13 Ill.2d 45, and the authorities cited therein concerned exceptions not found in the case at bar.

APPEAL DISMISSED,

BURKE, J., and FRIEND, J., concur.



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
OCTOBER TERM, A. D. 1962

38 I.A. 2 445

WILMA SCHULZ,

Plaintiff-Appellee,

v.

FREDERICK J. SCHULZ,

Defendant-Appellant.

Appeal from the

Circuit Court of

DuPage County.

SMITH, J.:

Defendant-appellant appeals from a decree of the Circuit Court of DuPage County enforcing the terms of a divorce decree obtained at the behest of plaintiff in Trego County, Kansas. He charges that the Kansas decree is void for want of jurisdiction over his person, and is thus not entitled to enforcement by a sister state under the full faith and credit clause of the United States Constitution. Jurisdiction over his person in Kansas is said to be ephemeral rather than real because, (1) the entry of appearance by him was obtained through duress, coercion, and undue influence, and (2) that it was fraudulently filed in the Kansas Court without authority from him. He says these facts are admitted because he put them in as an affirmative defense to the action in the Illinois Court, and no reply having been filed, they stand as admitted. Both counsel and the court treated the case as a motion for judgment on the pleadings, and our resolution of the case must therefore hinge on the pleadings and the law applicable thereto.

The undisputed factual sand bed is that the parties married in Kansas in 1949, with two children the resulting issue of the marriage. Defendant left his family in August of 1958 and took up residence in Ohio. In February of 1959, a written separation agreement was entered into which divided their property, left the children in the custody of the wife with reasonable visitation privileges, provided for no alimony, and fixed child support payments at \$100.00 per month for each child retroactive to September 1, 1958. On March 31, 1959, the Trego County Attorney wrote the defendant advising him that a felonious non-support complaint had been filed against him and a warrant would be issued against him unless adequate support was forthcoming within a reasonable time. On this last date defendant had paid about \$750.00 and was about \$650.00 in arrears under the separation contract. On September 15, 1959, defendant was arrested in Ohio, employed an attorney and was released on bond. On September 30, plaintiff's Kansas attorney wrote to defendant's Ohio attorney, enclosed a copy of a divorce complaint (filed in Trego County on the 26th of September) and an entry of appearance, and stated that "if the defendant would execute the enclosed entry of appearance and return it to this office, together with a draft, a certified check or your check in the sum of \$500.00, that she would proceed to get a divorce and would also have the present charges against Schulz dismissed." This letter also advised that the Trego County Attorney had no objection to a dismissal of the criminal charges. On October 9, the defendant signed the entry of appearance, duly acknowledged by his Ohio attorney, and forwarded the \$500.00. The criminal charges were dismissed. The entry of appearance was filed October 9, 1959 and on December 17, 1959, the Trego County District Court granted a divorce. By admission of his counsel in the Illinois proceedings, it appears that the defendant remarried either within a month or so before the divorce or within a like period thereafter. We have detailed the chronology of events to point out that the defendant's alleged defenses are born in a factual vacuum and are without merit either factually or as a matter of law.



It readily appears that we have here a collateral rather than a direct attack on the Kansas divorce. It requires no citation of authority for the proposition that a judgment entered without jurisdiction of the person is a nullity, nor for the proposition that the full faith and credit clause of the United States Constitution does not preclude an Illinois Court from inquiring into the proceedings of the sister state to determine whether or not that is a fact. It is clear, however, that we may not look beyond the record of that court to reach our determination. "This court has announced in many cases that in case of collateral attack on a judgment or decree all presumptions are in favor of the validity of the judgment or decree attacked, and want of jurisdiction to enter the same must appear on the face of the record to furnish the basis for such attack." *Steffens v. Steffens*, 408 Ill. 150, 153, 96 N. E. 2d 458, 459. "The decree cannot be collaterally attacked on defendant's petition for matters aliunde, dehors and beyond the record." *Anderson v. Anderson*, 4 Ill. App. 2d 330, 124 N. E. 2d 66, at 76. The record of the Kansas court is as pure as the falling snow. The entry of appearance is complete and duly acknowledged. The decree of that court finds that the entry of appearance was filed and "that the court has jurisdiction of the parties and of the subject matter". There is nothing on the face of the Kansas record affirmatively showing any want of jurisdiction. In fact it affirmatively shows jurisdiction. "[W]ant of jurisdiction to enter the decree must affirmatively appear on the face of the record to furnish a basis for collateral attack; it can be attacked collaterally only by the record itself. . . ." *In re Stiles*, 28 Ill. App. 2d 448, 171 N. E. 2d 799. The matters set up by the defendant in his affirmative defenses are all matters aliunde and dehors the record and are not available to him in this proceeding.

He further contends that his affirmative defenses stand unanswered and thus are admitted. His charges of duress and coercion and lack of authority

to file the appearance are but legal conclusions and as such are not admitted by failure to reply or specifically deny. *Crerar Clinch Coal Co. v. Board of Education*, 13 Ill. App. 2d 208, 141 N.E. 2d 393; *Reinhardt vs. Security Insurance Co.*, 312 Ill. App. 1, 38 N.E. 2d 310. Even if admitted, on the record before us, they do not establish want of jurisdiction in the Kansas Court or want of authority in the Illinois Court to enforce that decree. This record further shows that the defendant remarried after the delivery of the entry of appearance, and at or about the time of the decree. For twenty-one months he acquiesced in a marital status inconsistent with a void divorce, and his so-called affirmative defenses pale before his present position that he is a self-confessed bigamist.

There being no error in the record of the Circuit Court of DuPage County in this proceedings, its decree should be and is hereby affirmed.

Affirmed.

McNEAL, P. J. and DOVE, J. concur.

IN THE ~~SUBJECT~~
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
October Term, A.D. 1962

(38 I.A. 2449)

CHRISTINA MINGE,

Plaintiff-Appellant,

vs.

LOBDELL REALTY COMPANY, Inc.,
JANISCH-HAGERTY, Inc. and
GREGORY-ANDERSON, Inc.,

Defendants-Appellees.

Appeal from the
Circuit Court of
Winnebago County.

DOVE, J.

On March 4, 1960 the plaintiff filed in the Circuit Court of Winnebago County a complaint consisting of three counts. Count One alleged, among other things, that Lobdell Realty Company employed Janisch-Hagerty, Inc. to supervise and construct a roadway, known as Randy Road; that Janisch-Hagerty, Inc. employed Gregory-Anderson, Inc. to perform certain excavating in connection with the construction of said Randy Road; that in the construction of said road an elevated manhole was covered with loose dirt; that on April 8, 1958, as plaintiff was driving her automobile in a northerly direction on said road, the cast iron manhole "caught the undercarriage of her automobile", causing it to stop immediately and throwing plaintiff forward,

resulting in damage to her automobile and injuries to the plaintiff for which she sought a judgment against the Lobdell Realty Company for \$50,000.00. Count two was directed against Janisch-Hagerty Inc. It was based on the same occurrence and sought judgment against it for \$50,000.00. By Count three, plaintiff sought a recovery against said Gregory-Anderson, Inc. for the damage she sustained as a result of said occurrence on April 8, 1958.

On April 15, 1960 the motion of defendant, Gregory-Anderson, Inc. to strike Count three was heard and sustained. Count three was stricken but leave was granted plaintiff, at that time to file an amended complaint within five days. This was done and an amended three count complaint was filed on April 19, 1960. As in the original complaint, Count one of the amended complaint was directed against Lobdell Realty Company, Count two was directed against Janisch-Hagerty, Inc., and Count three was directed against Gregory-Anderson Inc. An answer was filed to Count three by Gregory-Anderson Inc. and an answer to Count two was filed by defendant therein, Janisch-Hagerty, Inc.

A motion by Lobdell Realty Company, defendant in amended Count one, to strike Count one of the amended complaint was heard and allowed on August 25, 1960. The order entered that day is as follows, viz:

"This day come the plaintiff and the defendant, Lobdell Realty Company, Inc. by their respective attorneys, and this cause comes on for hearing on the motion heretofore filed by defendant, Lobdell Realty Company, Inc., to strike Count one of the complaint. After having heard the arguments of counsel thereon and being fully advised in the premises, on due consideration, the court grants said motion, and Count one is stricken accordingly.

"It is therefore considered and adjudged by the court that the defendant, Lobdell Realty Company, Inc., have judgment against the plaintiff, Christina Minge, that said plaintiff take nothing by her suit against defendant, Lobdell Realty Company, Inc., and that said defendant, Lobdell Realty Company, Inc., go hence without day".

The issues made by amended Count two and the answer of Janisch-Hagerty, Inc., thereto and the issues made by Count three and the answer of Gregory-Anderson, Inc., were submitted to a jury on February 22, 1962. At the close of all the evidence the trial court directed a verdict for both defendants. Upon this verdict, an appropriate judgment was rendered.

On March 22, 1962, plaintiff's post-trial motion for a new trial was filed. On the same day, plaintiff filed another motion which stated that during the trial of this cause it developed that defendant, Janisch-Hagerty, Inc. had completed its contract with Lobdell Realty Company, Inc., on the road in question, on or about January 18, 1958 and that the other defendant, Gregory-Anderson Inc. had not commenced any work on this road until on or about April 17, 1958; that plaintiff sustained her injuries on April 8, 1958 and therefore, "it becomes evident that at the time of the accident in question, when this plaintiff, Christina Minge, was injured, upon the premises occupied and owned by Lobdell Realty Company, Inc., that the defendant, Lobdell Realty Company, Inc., was solely answerable for whatever injuries were sustained by the plaintiff, Christina Minge, in this cause; that this honorable court was in error when the aforesaid, Lobdell Realty Company, Inc.'s motion to dismiss was granted by this court. Wherefore, the plaintiff, Christina Minge, prays that the court order the Lobdell Realty Company, Inc. be reinstated as party defendant in this cause and a new trial ordered".

Upon a hearing of these motions, both were denied. On May 25, 1962 plaintiff filed her notice of appeal by which she appeals "from the judgment rendered on February 22, 1962 in favor

of the defendants", Janisch-Hagerty, Inc., and Gregory-Anderson Inc., and against the plaintiff; also "from the order denying plaintiff's motion for a new trial", and "from the plaintiff's motion to add Lobdell Realty Company, Inc., as a party defendant". The record on appeal was filed in this court on July 19, 1962 and appellant's brief and argument was filed on August 17, 1962.

In appellant's brief, counsel states that, "the record clearly shows that the other two defendants, Gregory-Anderson, Inc., and Janisch-Hagerty, Inc. were not responsible for the accident in question, so the plaintiff-appellant is not seeking a new trial as against these two defendants". In view of this statement counsel for these two appellees, Gregory-Anderson Inc., and Janisch-Hagerty, Inc. filed in this court their respective motions to dismiss this appeal as to them. This motion was sustained on September 5, 1962 and the appeal as to these defendants was dismissed.

As Lobdell Realty Company Inc., is now sole appellee the only question presented for our determination is the sufficiency of appellant's motion of March 22, 1962 by which she sought an order reinstating Lobdell Realty Company, Inc., as a party defendant. At that time the record disclosed that on August 25, 1960, the action against Lobdell Realty Company, Inc., was dismissed and an appropriate judgment in bar of the action rendered in its favor. Appellant in her motion filed March 22, 1962 did not ask that that judgment be vacated nor did appellant tender an amended pleading of any kind. Her counsel simply filed an unverified and unsupported motion. The sufficiency of the amended count to state ^{cause of} a/ action against appellee had long since been determined and judgment had been entered that appellant take nothing against

appellee. No complaint of that order has ever been made and appellant's notice of appeal makes no mention of this judgment.

What appellant now insists upon is that facts, which have never been alleged in any pleading, but which appellant insists, the trial court should have taken cognizance of, exist, and an order should have been entered on appellant's motion reinstating a count of the complaint which the court had previously determined stated no cause of action against appellant.

Deasy vs. City of Chicago, 412 Ill. 151, was an action by numerous police and fire officers of the City of Chicago to recover portions of salary allegedly due the plaintiffs from the City. Upon motion of the defendant the three count complaint was dismissed. Thereupon plaintiffs filed a motion to vacate the order of dismissal and for leave to amend their complaint for the purpose of making additional parties plaintiff. This motion was denied and the plaintiffs appealed.

In the course of its opinion the Supreme Court, in the Deasy case, considered the several reasons advanced in defendant's motion to dismiss and after stating that a complaint must state a cause of action and that if it did not it may be dismissed, held that the ruling of the trial court in refusing to vacate the order of dismissal was proper.

In affirming the order of the trial court denying plaintiffs leave to amend their complaint the court said that plaintiffs presented no proposed amendment when they sought the court's permission to amend or presented anything to show the materiality of the proposed amendment and therefore the court was justified in assuming that no amendment could have rejuvenated plaintiffs dead claims.

Counsel for appellant state that when the trial court on August 25, 1960, ruled that Count one of plaintiff's amended complaint did not state a cause of action, it was in error and that this amended Count one did set forth a cause of action against appellee. In its argument counsel sets forth portions of that amended count and states that the question of appellee's negligence should have been resolved by a jury. Upon this appeal the sufficiency of the amended first count of the complaint is not before us. No appeal from the final order of August 25, 1960 was taken and in its notice of appeal filed on May 25, 1962, appellant makes no reference to that judgment of August 25, 1960.

In her motion filed March 22, 1962 appellant did not seek to have the judgment of August 25, 1960 vacated nor did she present to the trial court any supplemental or amended count which she desired to file. Under the authorities the trial court did not err in its ruling and the judgment order appealed from must be affirmed.

Judgment order affirmed.

McNEAL, P.J. CONCURS

SMITH, J. CONCURS.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
October Term, A.D. 1962

38 I.A. 2450

LOIS MORGAN, Administratrix of the)	
Estate of Alonzo Morgan, Deceased,)	
)	
Plaintiff-Appellant,)	
)	
vs.	)	Appeal from the
)	
CHICAGO, BURLINGTON & QUINCY	)	Circuit Court of
RAILROAD COMPANY, a railroad)	
corporation and GEORGE SPENADOR,	)	Kane County.
)	
Defendant-Appellee.)	

DOVE, J.

On February 29, 1960 plaintiff filed her two count complaint to recover damages for the alleged wrongful death of Alonzo Morgan which occurred on October 6, 1959 when the automobile he was driving collided with a train operated by defendants at, what is referred to in the record, Case Street grade crossing in the Village of Montgomery, in Kane County.

Subsequently an amended complaint was filed which was thereafter amended. The first count of the amended complaint as amended was directed against the Chicago, Burlington and Quincy Railroad Company and the second count was directed against George Spenador, the engineer who was driving the railroad company engine and passenger cars at the time of the collision.

The defendants answered and the issues made by the pleadings were submitted to a jury. At the close of plaintiff's evidence, count two was dismissed by plaintiff. The jury thereafter returned a verdict in favor of the defendant, Railroad Company, and against the plaintiff. Upon this verdict judgment was rendered and subsequently plaintiff's post-trial motion was denied and plaintiff appeals.

The record discloses that, upon defendant's motion, before defendant had answered plaintiff's amended complaint, as amended, the court struck from said amended complaint as amended sub-paragraph (f) of paragraph 7 and also a portion of paragraph 6 of plaintiff's amended complaint as amended. Paragraph 6 of the amended complaint as amended read: "That the railroad crossing aforesaid is now and for more than ten years prior to the commencement of this suit, extra hazardous for persons and property lawfully using said Case street grade crossing. That because of said extra hazardous character of said crossing, on the 15th day of April, 1959, at Chicago, Illinois, the Illinois Commerce Commission entered an order as Docket No. 45663 whereby said grade crossing was designated as extra-hazardous within the meaning of Section 58 of 'an act concerning public utilities', as amended, and the defendant railroad corporation was directed and required to proceed immediately in the making of installation of a system of automatic flashing light signals combined with short arm gates and a warning bell, with selective speed controls for the said crossing. That the aforementioned order of the Illinois Commerce Commission directing the change in crossing protection at the said crossing has been, since the date of its entry or adoption, and is now, in full force and effect and has not in any way been amended, modified or reversea.'. A copy of which is attached hereto and made a part of this amended complaint by reference as exhibit 'A'".

All of this paragraph was stricken by the court, on motion of defendant, except the first sentence which reads: "That the railroad crossing aforesaid is now, and for more than ten years prior to the commencement of this suit, extra hazardous for persons and property lawfully using said Case Street grade crossing".

Sub-paragraph (f) of paragraph 7 of the amended complaint as amended, which the court, struck, charged that defendant, railroad corporation, "failed to comply with said order of the Illinois Commerce Commission entered pursuant to authority granted in Paragraphs 61 and 62, Chapter 111 2/3 pertaining to Public Utilities, Illinois Revised Statutes, said failure and violation of Order being that defendant railroad did not proceed immediately in making the installation of the protective facilities therein ordered".

Attached to the complaint and made a part thereof was a copy of the order of the Illinois Commerce Commission referred to in the pleadings. This order is dated April 15, 1959. It made the necessary jurisdictional findings and, among other things, found that the traffic over the Case Street grade crossing was heavy and concluded that by reason of the volume, nature and speed of the trains passing over the crossing, the volume and character of vehicular traffic thereover and the angle at which the tracks intersect the highway, that said crossing is extra hazardous within the meaning of Section 58 of the Public Utilities Act and should be so designated. The order designated this crossing as extra hazardous and directed the railroad to furnish, install, maintain and operate a system of automatic-flashing light signals, combined with short arm gates and a warning bell at this crossing. The order required and directed the railroad

company to proceed immediately in making the installation and to complete it within one year from the date of the order. The order also directed the railroad company to notify the Secretary of the Commission in writing upon completion of the installation and also to so notify the Secretary of the Commission on or before January 15, 1960 concerning the action it had taken toward making the installation and giving details as to the progress of preparation of the plans, obtaining of materials and scheduling of construction work.

Counsel for appellant state that this appeal is limited to the error of the trial court in the entry of the order which struck the indicated portion of paragraph 6 and also struck sub-paragraph (f) of paragraph 7 from plaintiff's amended complaint as amended. Counsel argue that these stricken allegations were relevant and material in connection with appellee's duty to protect the Case Street grade crossing and cite and rely upon *Healy vs. New York Central Railroad Company*, 326 Ill. App. 556,

Healy vs. New York Central Railroad Company, 326 Ill. App. 556 was an action to recover damages for injuries which the plaintiff suffered as a result of an accident when the automobile at the Main Street crossing in the Village of Ladd, of the plaintiff, collided with a freight train of defendant. In the complaint positive allegations were made that the Commerce Commission had entered an order, upon the application of the defendant, authorizing defendant to install at a railroad crossing on State Highway Route 89, known as Main Street, in the Village of Ladd, Illinois, flashlight signals in lieu of a flagman. The answer of the railroad company denied there was any such order of the Commerce Commission. On the trial plaintiff offered to prove the orders of the Commerce Commission. The objection to

this offer was sustained and what this court held, in reversing the judgment for the defendant, was that the pleadings presented an issue of fact and that the evidence was competent. The question presented in Fox vs. Illinois Central Railroad Company, 308 Ill. App. 367 was whether the complaint stated a cause of action and this court held that it did not because the complaint failed to allege that the defendant had violated any statute, ordinance, or regulation of the Commerce Commission.

In the instant case the order of the Commerce Commission was entered on April 15, 1959. It designated the crossing where this accident occurred as extra-hazardous and directed appellee, to install, maintain and operate automatic flashing light signals. It required appellee to proceed immediately to do this and to notify the Secretary of the Commission nine months after the entry of the order, as to the progress it had made in connection with its compliance. The order also directed appellee to complete the installation by April 15, 1960.

Plaintiff's intestate was killed on October 6, 1959, which was more than three months before appellee was required to make any report to the commission and was more than six months before appellee was required to complete the installation.

Sub-paragraph (d) of paragraph 7 of the complaint charged that defendant had violated its common law duty to exercise such care and precaution as would have enabled plaintiff's intestate to ascertain the approach of the passenger train which collided with decedent's vehicle. This paragraph also charged that defendant failed to install adequate and effective safety devices at this "unusually dangerous and more than ordinarily hazardous", crossing. The portion of paragraph six of the complaint



which was not stricken alleged that this crossing was an extra hazardous one for persons and property lawfully using the crossing and that it had been for more than ten years prior to the commencement of this proceeding. Defendant's answer denied these charges. Upon the trial, any evidence as to the nature of the crossing, what the signal conditions at the crossing were, immediately before and at the time of the accident, and the notice, if any, defendant had thereof was competent.

The order of the Commerce Commission required defendant to proceed immediately in making the installation of the automatic system of flashing light signals as outlined in its order. The commission recognized that compliance with said order would require time and fixed the time when the installation should be completed at one year from the date of the order. As indicated in the order, appellee was required to furnish the Secretary of the Commission on or before January 15, 1960, information as to the progress of plans^{obtaining}/of materials, and scheduling of construction work for this installation.

At the time of the death of plaintiff's intestate the time for this report to the Secretary of the Commission had not arrived. An examination of the provisions of the order of the Commerce Commission disclose that at the time of the death of plaintiff's intestate, there had been no default by appellee of any of its provision. While it was alleged that appellee did not proceed immediately after the order of the Commerce Commission was entered, to install the facilities at the crossing as required by the order of the Commission, there is no allegation amplifying this statement. In view, of the provisions of the order no causal connection can exist between the alleged breach of the provisions of the order of the Commerce Commission and the accident which occurred on October 6, 1959.

The record in the instant case discloses that the railroad tracks of appellee run in a northerly and southerly direction where they intersect Case Street, an east and west street in the Village of Montgomery, in Kane County. About 8 o'clock on the morning of October 6, 1959, Alonzo Morgan was driving his station wagon in an easterly direction on Case Street toward this railroad crossing. A bakery truck facing east had stopped immediately west of the tracks. Another vehicle facing west had stopped on the opposite side of the tracks. A freight train was standing on the siding about 200 feet south of the crossing. A north bound passenger train was approaching the crossing which was protected by a wigwag signal, with a red light flashing, and a bell ringing. As this passenger train approached this crossing these signals were in operation.

According to the testimony of Hazel Long, called as a witness for the plaintiff, she was the occupant of the car which faced west and which had stopped on the opposite or east side of the tracks. This witness testified that decedent approached the crossing, hesitated behind the bakery truck, then proceeded around it into the west lane of traffic and onto the tracks while the whistles on both the freight and passenger trains were blowing and while the wigwag signals were operating. The testimony of this witness was corroborated by the driver of the bakery truck and by other witnesses.

Upon appellant's motion, an order was entered herein dispensing with the usual abstract of the record, which our rules requires an appellant to file. Appellee filed an abstract of

36 pages, ten pages condensed the testimony of nine of the eleven witnesses who testified at the trial. The balance of the abstract of appellee sets forth the amended complaint, as amended, the various motions and rulings of the court thereon and the April 15, 1959 order entered by the Commerce Commission with reference to this crossing, a copy of which was attached to the amended complaint as amended.

We have examined the record which consists of 455 pages and find no merit in appellant's contention that she was deprived of a fair trial because certain portions of her amended complaint, as amended, were stricken by the trial court. There is no error in this record requiring the reversal of this judgment and it is, therefore, affirmed.

Judgment Affirmed.

McNEAL, P.J. CONCURS.

SMITH, J. CONCURS.

